SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.—No. 24.

AUGUSTUS D. HILLIARD,

*Plaintiff in Error,*

*vs.*

THOMAS S. GREENMAN.

# BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

BUTLER, STILLMAN & HUBBARD,
*Attorneys for Plaintiff in Error.*

GEORGE F. EDMUNDS,
WILLIAM ALLEN BUTLER,
*Of Counsel.*

Evening Post Job Printing Office, 208 Broadway, N. Y.

# Supreme Court of the United States.

AUGUSTUS D. JUILLIARD,
*Plaintiff in Error,*

*vs.*

THOMAS S. GREENMAN.

*October Term*—1882,
*No.* 24.

## Brief on behalf of Plaintiff in Error.

This cause comes up upon a writ of error to the Circuit Court of the United States for the Southern District of New York, allowed June 24, 1879, to review a judgment entered in favor of the defendant, June 11, 1879, against the plaintiff below, overruling a demurrer, and for costs.

*Writ of Error, Record, p.* 1.
*Judgment of Circuit Court, Record, p.* 6.

## Statement of the Case.

The action in which the judgment was rendered was brought by Augustus D. Juilliard, a citizen of the State of New York, as plaintiff, against Thomas S. Greenman, a citizen of the State of Connecticut, as defendant, to recover the sum of $5,100, a balance of the purchase price of 100 bales of cotton, sold and delivered by the plaintiff to the defendant at the City of New York, of the value and for the agreed price of $5,122.90, cash on delivery.

The COMPLAINT alleged the sale and delivery on the terms above stated; that the defendant had not paid, in whole or in part, for the said merchandise, except a payment of $22.90 on account, and that defendant is justly indebted to the

plaintiff therefor in the sum of $5,100, for which last mentioned sum, with interest from April 11, 1879, judgment was demanded.

*Complaint, Rec., p. 2.*

The ANSWER of the defendant, as amended, admitted the allegations as to the sale of the 100 bales of cotton, and the agreement to pay therefor, as stated in the complaint, and averred, by way of defense, that after the delivery of said cotton, and before the commencement of this action, the defendant offered and tendered to the plaintiff, in full payment therefor, $22.50 in gold coin of the United States, 40 cents in silver coin of the United States, and a United States note numbered "A 106, *series of* 1878," of the denomination of $5,000, and a United States note numbered "A 17,015, *series of* 1878," of the denomination of $100. That said notes were respectively of the description known as United States Legal Tender notes, purporting by recital thereon to be a legal tender, at their respective face values, for all debts, public and private, except duties on imports and interest on the public debt, but the plaintiff declined to receive said notes in payment of $5,100 of said indebtedness.

The answer further averred that said notes were a reissue of that amount of United States Legal Tender notes which had been redeemed, subsequent to January 1, 1879, at the United States Sub-Treasury, in New York. That they are notes which, after being presented for payment at said Sub-Treasury and paid in gold, were reissued and kept in circulation under and in pursuance of the act of Congress entitled "An Act to forbid the further retirement of United "States Legal Tender notes," approved May 31, 1878. The defendant further averred that he had kept said tender good, and brings the same into court.

*Answer, Rec., p. 4–5.*

The plaintiff below demurred to the amended answer, as insufficient in law; which demurrer was, upon argument, overruled by the Circuit Judge; and final judgment was rendered June 11, 1879, dismissing the complaint with costs.

A writ of error was duly allowed, and a citation issued whereby the cause was duly brought to this court.

## Assignment of Errors.

The plaintiff in error assigns errors in the judgment of the court below overruling the demurrer to the amended answer of the defendant, and dismissing the complaint, and directing judgment for the defendant, as follows:

*First.*—That it appears on the face of said amended answer that the same is insufficient in law.

*Second.*—That it appears on the face of said amended answer that the tender of payment therein averred was not made in gold coin of the United States.

*Third.*—That it appears on the face of the said amended answer that the two several United States notes therein particularly described, and being of the description known as United States Legal Tender notes, and numbered "A 106, series of 1878," of the denomination of $5,000, and "A 17,015, series of 1878," of the denomination of $100, alleged in and by said answer to have been tendered to the plaintiff, were not, nor was either of them, lawful money of the United States, valid as a tender for the payment of any private debt.

*Fourth.*—That it appears on the face of the said amended answer that the said two several United States notes were, respectively, notes which had, before the time of the tender thereof averred in and by the said amended answer, been issued by the Secretary of the Treasury of the United States in place of certain other Treasury notes of like description and denomination in circulation prior to January 1, 1879, which had been redeemed at the United States Sub-Treasury in the City of New York subsequent to January 1, 1879, and paid in coin, and were, at the time of the alleged tender, notes which had been issued and kept in circulation solely under and in pursuance of the Act of Congress entitled "An Act to forbid the further retirement "of United States legal tender notes," approved May 31, 1878, which said last mentioned act did not make the said notes so issued a legal tender for the payment of private debts.

*Fifth.*—That it appears on the face of said amended answer that the said two several United States notes were, respectively, notes which had, before the time of the tender thereof averred in and by the said amended answer, been issued by the Secretary of the Treasury of the United States in the place of certain Treasury notes of like description and denomination in circulation prior to January 1, 1879, which had been redeemed at the United States Sub-Treasury in the City of New York subsequent to January 1, 1879, and paid in coin, and were, at the time of the alleged tender, notes which had been issued and kept in circulation solely under and in pursuance of the Act of Congress entitled "An Act to forbid the further retirement "of United States legal tender notes," approved May 31, 1878, which said last mentioned act, so far as the same attempted to authorize the issue of such redeemed Treasury notes, with the quality of legal tender, or as lawful money, was and is repugnant to the Constitution of the United States.

*Sixth.*—That it appears on the face of said amended answer that no valid tender of payment for the merchandise therein referred to was made by the defendant.

*Seventh.*—That it appears upon the face of the record that the plaintiff below was entitled to judgment on the demurrer for the sum claimed in the complaint, with interest and costs.

## The Questions Presented.

In support of the above assignment of errors it is submitted on the part of the plaintiff in error:

*First.*—That the Act of May 31, 1878, therein referred to, cannot be construed as giving to the United States notes required by the act to be issued, paid out, and kept in circulation, the incident or quality of legal tender; and

*Second.*—That if said act must be so construed, then it is, to that extent, UNCONSTITUTIONAL AND VOID.

# POINTS.

## FIRST POINT.

**The questions above stated, involving the construction and validity of the Act of May 31, 1878, are open questions in this court, not controlled by the decision in the Legal Tender cases, which related solely to the Legal Tender clauses of the Acts of 1862 and 1863, and upheld them solely in view of the public exigency in reference to which they were enacted.**

I.

The legal tender clauses of the acts of February 25, 1862, July 11, 1862, and March 3, 1863, applied only to the United States notes authorized by those acts to be issued by the Secretary of the Treasury as therein provided, and to be reissued by him from time to time as the exigencies of the public service might require.

These clauses were enacted by Congress, were approved by the Executive, and were upheld by this court in the *Legal Tender cases*, 12 Wall., 457, as WAR MEASURES, exceptional in their character, not authorized by any express grant of power to Congress contained in the Constitution, but as not prohibited by its terms, and as justified in view of the great public exigencies which required their adoption.

That nothing beyond this has been determined in respect to the legal tender clauses of the Acts of 1862 and 1863, will be apparent on a review of the several stages of the legal tender currency, from its first inception to the time of the adjudication by this court as to validity of the legal tender legislation.

The course of Legislative, Executive and Judicial action on this subject is familiar to the court as matter of public history, largely derived from its own records, but for greater certainty, and for convenience of reference, we submit, in proof and elucidation of the above proposition, the following

SUMMARY OF THE ACTION OF THE GOVERNMENT OF THE UNITED STATES, IN ITS SEVERAL DEPARTMENTS, EXECUTIVE, LEGISLATIVE AND JUDICIAL, IN REFERENCE TO THE "LEGAL TENDER" QUALITY OF THE UNITED STATES NOTES.

## 1861.

Congress met December 2, 1861, at a time when the War of the Rebellion had already assumed vast proportions, and the Government had called into active military and naval service more than 500,000 men.

On December 10, 1861, the Secretary of the Treasury submitted his annual report, in which he said, "to enable "the Government to obtain the necessary means for prose- "cuting the war to a successful issue, without unnecessary "cost, is a problem which must engage the most careful "attention of the Legislature."

He then suggested a plan for a National currency, to be issued by National Banking associations, secured by the pledge of United States bonds. No reference was made in this report to any issue of United States notes.

There were then outstanding Treasury notes payable on demand, without interest, which had been issued by the Secretary of the Treasury, under the Acts of Congress, approved July 17, 1861, and August 5, 1861, amounting in the aggregate to $50,000,000 (*see U. S. Stats. at L., vol.* 12, *pp.* 259, 313).

This amount was afterwards increased to $60,000,000 by the Act approved February 12, 1862 (*Id., p.* 338).

The banks in New York, Boston and Philadelphia suspended specie payments, December 28, 1861.

On December 30, 1861, a bill was introduced into the House of Representatives, by Mr. Spaulding, of New York, to authorize the issue by the Secretary of the Treasury, "for temporary purposes," of "$100,000,000" non-interest bearing Treasury notes, "payable generally, without speci- "fying any place or time of payment, and of such denomi- "nations as he may deem expedient, not less than $5 each." The notes were made receivable for all debts and demands due to or by the United States, and were declared to be "lawful money and a legal tender in payment of all debts, "public and private, within the United States." The bill was referred to the Committee of Ways and Means.

*Cong. Globe*, 1861–2, *Part I*, *p.* 181.

*Spaulding's Financial History of the War*, *p.* 14.

## 1862.

On January 7, 1862, the Committee of Ways and Means reported the bill.

It contained, besides the provisions above stated, a provision for the funding of the legal tender notes, authorized thereby, into United States six *per cent.* twenty year bonds.

*Cong. Globe* 1861–2, *Part* 1, *p.* 218.

The bill was under consideration in the House of Representatives and in the Committee of Ways and Means until February 6, 1862.

On January 22, 1862, the committee reported an additional section providing for the issue of $500,000,000 six *per cent.* bonds for funding the proposed Treasury notes and the floating debt of the United States.

Up to the last mentioned date, the proposed measure had received no sanction, as to the proposed legal tender clauses, from the Executive Department.

On January 22, 1862, the Secretary of the Treasury, in answer to a resolution of the Committee of Ways and Means, requesting his opinion as to the propriety and neces-

sity of the passage of the bill, addressed them in an official communication, as follows:

"The provision making United States notes a legal tender "has, doubtless, been well considered by the committee, and "their conclusion needs no support from any observation of "mine. I think it my duty, however, to say, that in respect "to this provision my reflections have conducted me to the "same conclusions they have reached. It is not unknown "to them that I have felt, nor do I wish to conceal that I "now feel, great aversion to making anything but coin a "legal tender in payment of debts. It has been my anxious "wish to avoid the necessity of such legislation. It is, "however, at present, impossible, in consequence of the "large expenditures entailed by the war, and the suspen-"sion of the banks, to procure sufficient coin for disburse-"ments; and it has, therefore, become indespensably neces-"sary that we should resort to the issue of United States "notes. * * * The committee, doubtless, feel the neces-"sity of accompanying this measure by legislation neces-"sary to secure the highest credit as well as the largest "currency of these notes. This security can be found, in "my judgment, by proper provisions for funding them in "interest-bearing bonds; by well-guarded legislation au-"thorizing banking associations with circulation based on "the bonds in which the notes are funded; and by a judi-"cious system of adequate taxation."

*Letter of Secretary Chase, Cong. Globe*, 1861–62, *Part* 1, *p.* 618.

The proposed legal tender clauses of the bill provoked protracted and earnest debate in the House of Representatives.

They were vigorously opposed, on the ground of unconstitutionality as well as impolicy, by leading representatives of both political parties.

The provision for making the notes a legal tender was pressed by all its advocates as a WAR MEASURE of imperative necessity; as a means of national self-preservation, justified and required by the end to be attained.

The representative who introduced the bill said, in opening the discussion:

"The bill before us is a WAR MEASURE, a measure of "necessity and not of choice, * * to meet the most

" pressing demands upon the Treasury, to sustain the army " and navy until they can make a vigorous advance upon " the traitors and crush out the rebellion. These are ex- " traordinary times, and extraordinary measures must be " resorted to, in order to save our Government and preserve " our nationality, * * the life of the nation is in peril."

*Speech of Mr. Spaulding, of N. Y., Cong. Globe, 1861–62, Part 1, p. 523.*

On February 3, 1862, the Secretary of the Treasury wrote a letter, which was used in the House of Representatives in aid of the bill, in which he said:

" It is true that I came with reluctance to the conclusion " that the legal tender clause is a necessity, but I came to " it decidedly, and I support it earnestly. * * * Imme- " diate action is of great importance. The Treasury is " nearly empty. I have been obliged to draw for the last " installment of the November loan; so soon as it is paid I " fear the banks generally will refuse to receive the United " States notes. You will see the necessity of urging the " bill through without more delay."

Mr. Hooper, of the Committee of Ways and Means, said:

" It is possible they (the United States notes) would be- " come a practical tender like bank notes, without provid- " ing for them to be a legal tender, but in the present emer- " gency * * * nothing should be omitted to add to " their efficiency."

*Speech of Mr. Hooper, of Mass., Id. p. 617.*

After repeated amendments and prolonged discussion the bill passed the House of Representatives, February 6, 1862, under the pressure of the impending ruin of the credit of the Government, by a vote of 93 to 59.

The view of the majority is well summed up in the remarks of one of their number, immediately before the taking of the final vote:

" If this question came up in ordinary times, I am frank " to confess that I might, perhaps, have had some doubt of " its constitutionality, sufficient to induce me to oppose it.

" * * * But, sir, in this, our extremity, while we are " struggling to perpetuate the Government, I am willing to " go to the very verge of the Constitution. * * * I " treat this, Mr. Chairman, as emphatically and clearly a " WAR MEASURE."

*Speech of Mr. Kellogg, of Illinois, Cong. Globe, 1861–2, Part I, p. 679.*

In the Senate as well as in the House of Representatives the measure was strenuously opposed on constitutional grounds. It was urged as " a temporary expedient which " we dare not repeat."

*Speech of Senator Sherman, Cong. Globe, 1861, Part I, p. 791.*

Senator Sumner said:

" In the present exigency, money must be had. * * * " We must all set our faces against any proposition like the " present, except as a temporary expedient rendered neces- " sary by the exigencies of the hour; * * * and yet " I cannot give such a vote without warning the Govern- " ment against the dangers from such an experiment. *The " medicine of the Constitution must not become its daily bread.*"

*Id. p. 799.*

The bill passed the Senate, with amendments, after a motion to strike out the legal tender clause had failed, by a vote of 17 to 22, and, as the result of conference, was again passed by the House of Representatives, February 25, 1862, and on the same day was approved by President LINCOLN.

The bill as passed and approved was entitled " An Act to " authorize the issue of United States notes, and for the re- " demption and funding thereof, and for funding the float- " ing debt of the United States."

*U. S. Stats. at Large, Vol. 12, p. 345.*

It authorized the issued of $150,000,000 Treasury notes, of which $50,000,000 were to be in lieu of the demand notes issued under the act of July 17, 1861, to be receivable in payment of all taxes, internal duties, excises and demands of every kind due to the United States, except duties on im-

ports, and of all claims against the United States, except for interest upon bonds and notes. The notes authorized by the act were declared to be "lawful money and a legal "tender in payment of all debts, public and private, within "the United States, except duties on imports and interest "as aforesaid." The act provided for the funding of the notes at the option of the holder in sums of $50, or some multiple thereof, in United States six *per cent.* five-twenty gold bonds.

The act also provided that the notes authorized by it might be reissued from time to time as the exigencies of the public interests shall require.

*U. S. Stats. at Large, Vol.* 12, *p.* 345.

Legal tender notes, commonly called "greenbacks," were thereupon issued by the Secretary of the Treasury to the full amount authorized by the act, $150,000,000.

The notes of the first issue bore date March 10, 1862, and the printed endorsement which declared them to be a legal tender also declared "this note is exchangeable for U. S. "six *per cent.* bonds redeemable at the pleasure of the United "States after five years."

A few weeks later, by Act of March 17, 1862, the demand notes which had been authorized by the earlier acts of July 17, 1861, and February 12, 1862, were declared to be "lawful money and a legal tender"

*Id., p.* 370.

On June 7, 1862, the Secretary of the Treasury asked Congress for authority for a further issue of $150,000,000 of legal tender notes, of which $35,000,000 should be of a denomination less than $5.

In this communication he says that the necessities of the country justify the course proposed, and that as the legal tender notes are convertible into bonds bearing six *per cent.* interest, payable in coin, small notes may be issued as well as large notes.

*Miscellaneous Docs., No.* 81, *H. R.*, 1862.

An act was accordingly passed authorizing the increased issue, and approved July 11, 1862. It contained the same provisions as to funding into United States bonds as the former Act of February 25, 1862.

*U. S. Stats. at Large, Vol.* 12, *p.* 532.

## 1863.

On January 17, 1863, a joint resolution of Congress authorized the Secretary of the Treasury, if the exigencies of the public service should so require, to issue an additional $100,000,000 of legal tender notes, to be a part of any amount to be provided for by any bill that may be passed by this Congress.

*U. S. Stats. at Large, Vol.* 12, *p.* 822.

President LINCOLN accompanied his signing of this joint resolution with a message to Congress, stating that he had done so in order to enable the Government to discharge the arrears of pay "due to our soldiers and our sailors," and expressing "extreme regret" that the additional issue of notes was found "necessary."

*Cong. Globe*, 1862–63, *Part* 1, *p.* 381.

By Act of March 3, 1863, the Secretary of the Treasury was authorized to make a further issue of $150,000,000 legal tender notes, including the amount authorized by the joint resolution of January 17, 1863.

This act requires the holding of outstanding legal tender notes to avail of the existing privilege of exchanging them for bonds, on or before July 1, 1863, and then provided that "thereafter the right so to exchange the same shall "cease and determine."

*U. S. Stats. at Large, Vol.* 12, *p.* 709.

By the last mentioned act the absolute right, reserved by the original legal tender acts, to the holders of legal tender notes to convert them into bonds, was taken away.

The Act of March 3, 1863, also provided that any of the legal tender notes "when returned to the Treasury, may be

" reissued from time to time as the exigencies of the public " service may require. And in lieu of any of said notes, or " any other United States notes, returned to the Treasury, " and canceled or destroyed, there may be issued equal " amounts of United States notes, such as are authorized by " this act."

The three Acts of February 25, 1862, July 11, 1862, and March 3, 1863, together, authorized the issue of legal tender notes to the amount of $450,000,000, but the construction given by the Treasury Department was that the sum of $50,000,000 required by the Act of July 11, 1862, for the payment of temporary deposits, was intended as a temporary issue, and when once withdrawn from circulation was not to be reissued.

This construction was upheld by the Supreme Court in the case of the *The Bank* v. *The Supervisors*, 7 Wall., 26. The Chief Justice delivering, the opinion of the court, says: " The Act of February 25, 1862, provided for the issue of " these notes to the amount of $150,000,000. The Act of " July 11, 1862, added another $150,000,000 to the circula- " tion, reserving, however, $50,000,000 for the redemption of " tempory loan, to be issued and used only when necessary " for that purpose. Under the Act of March 3, 1863, " another issue of $150,000,000 was authorized, making the " whole amount authorized $450,000,000 and contemplating " a permanent circulation, *until resumption of payment in coin*, " of $400,000,000."

## 1864.

By Act of March 3, 1864, the Secretary of the Treasury was authorized to issue bonds to the amount of $200,000,000 payable at not less than five, nor more than forty years from date, at interest not exceeding six *per cent.* per annum (the 5 *per cent.* " ten-forty " bonds so called), and at his discretion to dispose of them for Treasury notes.

13 *U. S. Stat. at Large, p.* 13.

Up to this time the question of the constitutionality and validity of the legal tender clauses of the Acts of 1862 and

1863 had not been raised in this court. But it had been the subject of litigation and controversy in the State courts, and in those tribunals had received the consideration of many jurists and judges.

During the term of this court, in the winter of 1864, the case of *Roosevelt* v. *Meyer*, came before it on a motion to dismiss the writ of error for want of jurisdiction. The record brought up by the writ of error to the Court of Appeals of the State of New York showed that the action was for a debt for which the defendant had tendered the amount in legal tender notes authorized by the Act of February 25, 1862, which the plaintiff refused. The validity of the legal tender clause of that act was thus drawn in question, and the decision of the Court of Appeals had been in favor of its validity.

The defendant thereupon brought a writ of error under section 25 of the Judiciary Act of 1789. The writ was dismissed for want of jurisdiction, on the ground that the judgment of the New York Court of Appeals having been in favor of the act, this court had no jurisdiction to reverse that judgment.

*See Roosevelt* v. *Meyer*, 1 Wall., 512, p. 517.

By Act of June 30, 1864, Congress provided that the total amount of United States notes issued or to be issued, should never exceed $400,000,000, and such additional sum, not exceeding $50,000,000, as may be temporarily required for the redemption of temporary loan.

*U. S. Stats. at Large, vol.* 13, *p.* 218.

The last mentioned act, of June 30, 1864, was passed at the period of the greatest depreciation of the legal tender notes.

The public debt existing on that day, which was the close of the fiscal year, was $1,740,690,489, of which United States notes, greenbacks, amounted to $481,178,670, and their actual value in gold was only about thirty-five cents on the dollar. On July 11, 1864, gold ruled in the market in New York at 285½. This was the lowest point of depression of the legal tender currency.

## 1865.

By Act of January 28, 1865, amendatory of the Act of June 30, 1864, interest-bearing Treasury notes of the character authorized by section 2 of the act amended, were authorized to be issued, in lieu of bonds, with a proviso that the act should not be construed so as to give any authority for the issue of any legal tender notes, in any form, beyond the unissued balance of the amount authorized by the second section of the amended act.

*U. S. Stats. at Large, vol.* 13, *p.* 425.

In April and May, 1865, the surrender of the armies of the rebel generals took place and, as matter of fact, the rebellion was suppressed and the war was at an end.

The Secretary of the Treasury, in December, 1865, in his Report, strongly recommended the retiring of the legal tender notes, and urged that the legal tender acts "were "WAR MEASURES, passed in a great emergency; that they "should be regarded only as temporary; that they ought "not to remain in force a day longer than would be neces- "sary to enable the people to prepare for a return to the gold "standard; and that the work of retiring the notes which "have been issued, should be commenced, without delay, "and carefully and persistently continued until all are re- "tired."

On December 18, 1865, the House of Representatives, by a vote of 144 to 6, passed the following resolution:

"RESOLVED, That this House cordially concurs in the views "of the Secretary of the Treasury, in relation to the neces- "sity of a contraction of the currency, with a view to as "early a resumption of specie payments as the business in- "terests of the country will permit; and we hereby pledge "co-operative action to this end as speedily as possible."

*Cong. Globe*, 1865, *Part* 1, *p.* 75.

## 1866.

During this year the authority of the United States Government over the whole territory of the Union was restored *de jure* as well as *de facto*. By successive proclamations of the President, April 2, 1866, and August 20, 1866, the suppression of the rebellion in certain States, and finally its entire suppression, was authoritatively declared. In legal contemplation this was the end of the war.

*U. S.* v. *Anderson*, 9 Wall., 56.

By Act of April 12, 1866, Congress authorized the Secretary of the Treasury, at his discretion, to receive Treasury notes in exchange for any of the bonds authorized by the Act of March 3, 1865, and to sell such bonds and use the proceeds for retiring Treasury notes, with a proviso "that "of United States notes not more than $10,000,000 may be "retired and canceled within six months from the passage "of this act, and thereafter not more than four million of "dollars in any one month."

*U. S. Stats. at Large*, *Vol.* 14, *p.* 31.

The amount of legal tender notes in actual circulation, including demand notes, had reached its highest point about August 31, 1865, when it was $433,160,569.

Immediately before the passage of the above act of 1866, at the time of the proclamation of the President, April 2, 1866, declaring the rebellion ended in certain States therein named, it was $422,749,252.

It was first reduced below four hundred millions of dollars September 1, 1866, just after the President's proclamation of August 20, 1866, declaring the rebellion at an end, when it was $399,603,592, and it has never been so high since that day.

Under the operation of the Act of April 12, 1866, the legal tender debt was gradually reduced to $356,000,000 by the retirement of $44,000,000 of the notes, but on February 4, 1868, Congress summarily arrested the process of contraction by the passage of the act next to be noticed.

## 1868.

On February 4, 1868, Congress passed the following act, which became a law *without the approval of the President:*

"*An Act to suspend further reduction of the currency.*

"Be it enacted by the Senate and House of Representa-" tives of the United States of America, in Congress as-" sembled, that from and after the passage of this act the " authority of the Secretary of the Treasury to make " any reduction of the currency, by retiring or canceling " United States notes, shall be and is hereby suspended; " but nothing herein contained shall prevent the cancel-" lation and destruction of mutilated United States notes, " and the replacing of the same with notes of the same " character and amount."

*U. S. Stats. at Large, Vol.* 16, *p.* 34.

## 1869.

By the act "To strengthen the public credit," approved March 18, 1869, Congress provided and declared "that the " faith of the United States is solemnly pledged to the pay-" ment in coin, or its equivalent, of all the obligations of the " United States not bearing interest, known as United States " notes." * * * "And the United States also solemnly " pledges its faith to make provision at the earliest prac-" ticable period for the redemption of United States notes " in coin."

*U. S. Stats. at Large, Vol.* 16, *p.* 1.

At the terms of this court of December, 1867, and December, 1868, several cases were pending which involved questions arising under the legal tender clauses of the Acts of 1862 and 1863.

In one of these, *Lane County* v. *The State of Oregon*, the court announced a decision, in 1869, holding that the legal tender provision of the Acts of 1862 and 1863 related only to "*debts*" in the ordinary sense of the word, and had no reference to taxes imposed by State authority.

In other cases the court held that contracts made prior to 1862, which, by their express terms, were payable in gold coin, could not be satisfied by a tender of United States notes issued under the legal tender acts.

See—

*Lane County* v. *State of Oregon*, 7 Wall., 71.
*Bronson* v. *Rodes*, *Id*, 229.
*Butler* v. *Horwitz*, *Id.*, 258.
*Thompson* v. *Riggs*, 5 Wall., 663.
*Broderick's Ex'r* v. *Magraw*, 8 Wall,, 639

Still later, during December Term, 1869, the court held that a covenant in a lease of real estate made in 1854, giving an option to purchase, at a fixed price, at any time within ten years, the option having been exercised in 1864, must be construed as requiring payment in gold coin, and could not be satisfied by legal tender notes and decreed accordingly.

*Willard* v. *Tayloe*, 8 Wall., 557.

Before the decisions in either of the above cases, and as early as December Term, 1867, another case, *Hepburn* v. *Griswold*, which had been brought to this court by writ of error from Kentucky, and which involved the direct question of the constitutionality of the legal tender clauses as to all contracts existing at the time of the passage of the Act of 1862, had been argued upon printed briefs and submitted to the court.

Subsequently the court ordered this cause and other causes involving, incidently, the same question, to stand over to December Term, 1868, for reargument, with leave to the Government to be heard.

Accordingly the question was fully argued by counsel for parties interested in the several cases, and by the Attorney-General.

The question had also been, to a large extent, discussed in the cases above referred to. The court held the reargued case under advisement, and rose at the end of the December Term, 1869, without having announced a decision.

## 1870.

While the legal tender question was thus under advisement, the case of *Veazie Bank* v. *Fenno*, 8 Wall, 533, was decided by this court early in 1870. It came up on a certificate of division from the Circuit Court of Maine, and involved the question of the power of Congress to provide for taxing the circulating notes of State banks as had been done by the Act of July 13, 1866, amendatory of prior internal revenue acts, and which directed the levying of a tax of ten *per cent.* on the amount of the circulating notes issued by any "person, State bank or State banking association."

The opinion of the court, delivered by the Chief Justice, upholds the power of Congress to tax such bank circulation, under the grant of authority in the Constitution "to lay and "collect taxes, duties, imposts and excises, to pay the debt "and provide for the common defense and general welfare of "the United States."

This language is used:

"It is settled by the uniform practice of the Government, "and by repeated decisions, that Congress may constutionally "authorize the emission of bills of credit. It is not important "here to decide whether the quality of legal tender, in pay- "ment of debts can be constitutionally imparted to these "bills; it is enough to say that there can be no question of "the power of the Government to emit them, to make them "receivable in payment of debts to itself, to fit them for use "by those who see fit to use them in all the transactions of "commerce, to provide for their redemption, to make them "a currency uniform in value and description and convenient "and useful for circulation. These powers, until recently, "were only partially and occasionally exercised. Lately, "however, they have been called into full activity, and Con- "gress has undertaken to supply a currency for the entire "country * * It now consists of coin, of United States "notes, and of the notes of the National banks. Both de- "sciptions of notes may be properly described as bills of "credit, for both are furnished by the Government, both "are issued on the credit of the Government, and the "Government is responsible for the redemption of both, "primarily as to the first description, and immediately

"upon default of the bank as to the second. When these "bills shall be made convertible into coin at the will "of the holder, this currency will, perhaps, satisfy the "wants of the community in respect to a circulating "medium as perfectly as any mixed currency that can be "devised."

*Veazie Bank* v. *Fenno*, 8 Wall, 548.

Shortly afterwards, on February 7, 1870, the decision in *Hepburn* v. *Griswold*, 8 Wall, 603, was announced.

The case, as stated by the court, was on a promissory note for $11,250, which fell due February 20, 1862, five days before the approval of the first of the Legal Tender Acts, February 25, 1862. After February 25, 1862, and after suit brought, payment was tendered in greenbacks and refused.

The State Court declared the tender good and adjudged the debt to be satisfied accordingly. This judgment was, upon appeal to the Court of Errors of Kentucky, reversed. This court affirmed the judgment of the Appellate Court, and held that the "defendant in error was not bound to re- "ceive from the plaintiffs the currency tendered to him in "payment of their note, made before the passage of the Act "of February, 25, 1862."

The discussion of the questions involved in *Hepburn* vs. *Griswold*, embraced the whole subject of the power of Congress under the Constitution to pass the Legal Tender Acts.

The court as constituted at the time of the argument and of the announcement of the decision, under the operation of the Act of July 23, 1866, was composed of a chief justice and six associate justices.

The opinion of the court, delivered by Chief Justice CHASE, Associate Justices NELSON, CLIFFORD and FIELD concurring, and also Mr. Justice GRIER, who was a member of the court when the cause was decided in conference (November 27, 1869), and when the opinion was directed to be read (January 29, 1870) was adverse to the constitutionality of the legal tender clauses (8 Wall, 604). Associate Justices MILLER, SWAYNE and DAVIS dissented.

## 1871.

After the announcement of the decision in *Hepburn* v. *Griswold* a motion was made to this court by the Attorney-General to reconsider the question of the constitutionality of the Legal Tender Acts.

The constitution of the court had, in the interval between the decision of *Hepburn* v. *Griswold* and the application for a reargument, been changed by the Act of April 10, 1869 (16 *Stats. at Large*, 44) increasing the number of associate judges to nine, which took effect on the first Monday of December, 1869, and a motion for a reconsideration of the question was made before the court as thus reconstituted.

Subsequently a majority of the court (four judges dissenting) made an order that counsel for the parties denying the validity of the legal tender clauses, and the Attorney-General be heard upon the following questions:

1. Is the Act of Congress, known as the Legal Tender Act, constitutional as to contracts made before its passage?

2. Is it valid as applicable to transactions since its passage?

On April 18, 1871, argument was accordingly again heard upon the above-stated questions, not in the case of *Hepburn* v. *Griswold*, but in two cases pending in the court involving the question of the power of Congress to make Treasury notes a legal tender between private persons in the discharge of pre-existing debts, one of which involved the question of the application of the legal tender clause in respect to contracts made after its passage.

The first case, *Knox* v. *Lee*, brought to this court by writ of error to the Circuit Court for the Western District of Texas, was this:

Mrs. Lee, a loyal citizen of the United States, residing in Pennsylvania, owned a flock of sheep in Texas at the time of the outbreak of the Rebellion. This property was con-

fiscated and sold in March, 1863, by the Confederate authorities as belonging to an alien enemy. Knox purchased the sheep, paying for them in Confederate money, then worth the third part of a like sum in coin. After the Rebellion Mrs. Lee sued Knox in trespass for the taking and conversion of the sheep. Knox pleaded in bar the confiscation and sale by the Confederate Government. The court in Texas overruled the plea. At the trial the plaintiff offered to show the difference in value between gold and legal tender notes for the purpose of allowing the jury to estimate the difference. The court held, that as the United States currency was made a legal tender by law, there was legally no difference in value between the two, and charged the jury to recollect in assessing damages that whatever amount they might give by their verdict could be disharged in legal tender notes. The jury found for the plaintiff $7,368, and the defendant brought a writ of error complaining—first, of the overruling of his plea, and, second, of the charge as above stated, which he claimed had led the jury improperly to increase the damages (12 Wall, 457–459).

The second case, *Parker* v. *Davis*, came to the court by appeal from a decree of the Supreme Judicial Court of Massachusetts. The case arose on a bill in equity by Davis to compel the specific performance of a contract by Parker to convey a lot of land to Davis for a given sum. The contract was dated and the suit brought before February 25, 1862. The Supreme Court of Massachusetts, after the passage of the acts, decreed that Davis should pay into court a certain sum, and that Parker should execute the deed of the land.

Davis thereupon paid into court the sum named, in legal tender notes. Parker refused to execute the deed on the ground that he was entitled to have the sum paid into court in coin. The court, after hearing, changed the decree and ordered that Parker execute the deed on payment into court by Davis of the specified sum in legal tender notes.

From this decree the plaintiff appealed to this court under the 25th section of the Judiciary Act.

On May 1, 1871, the decision of the court was announced, adjudging both of the above questions in the affirmative (11 Wall, 682; 12 Wall, p. 528), thereby overruling the case of *Hepburn* v. *Griswold*, and sustaining the constitutionality and validity of the legal tender clauses of the Acts of 1862 and 1863, both as to contracts made before and after their passage.

The court stated that the opinions would be read thereafter.

## 1872.

On January 15, 1872, the opinions in the above mentioned cases were delivered (*The Legal Tender Cases*, 12 Wall, 457).

The remarks of Chief Justice CHASE, in his dissenting opinion, in reference to the reversal by the court of its former decision, may properly be quoted:

"A majority of the court, five to four, in the opinion "which has just been read, reverses the judgment rendered "by the former majority of five to three, in pursuance of "an opinion formed after repeated arguments, at successive "terms, and careful consideration; and declares the legal "tender clause to be constitutional; that is to say, that an "act of Congress making promises to pay dollars legal "tender, as coined dollars, in payment of pre-existing debts, "is a means appropriate and plainly adapted to the exercise "of powers expressly granted by the Constitution, and not "prohibited itself by the Constitution, but consistent with "its letter and spirit. And this reversal, unprecedented in "the history of the court, has been produced by no change "in the opinions of those who concurred in the former judg-"ment. One closed an honorable judicial career by "resignation after the case had been decided—after the "opinion had been read and agreed to in conference—and "after the day when it would have been delivered in court, "had not the delivery been postponed for a week to give "time for the preparation of the dissenting opinion. The "court was then full, but the vacancy caused by the resigna-"tion of Mr. Justice GRIER having been subsequently filled, "and an additional justice having been appointed under the "act increasing the number of judges to nine, which took

" effect on the first Monday of December, 1869, the then " majority find themselves in a minority of the court, as now " constituted, upon the question."

## II.

Pausing here, to revert to the successive steps leading up to the affirmance by this court of the power of Congress to enact the Legal Tender laws, it will be seen that the Judicial as well as the Legislative and Executive departments rested their action on substantially the same ground.

The action of Congress in the passage of the first Legal Tender Act was, as already exhibited, placed distinctly upon the ground of the existing imperative needs of the Government and the legal tender clause was urged and adopted as a WAR MEASURE.

The plea of necessity—" the plea of the hour "—was accepted as a justification for the exercise of a legislative power admitted to be doubtful, but finally resorted to as a power which must be deduced from the whole scope of the constitutional grants of power to Congress, if not implied from some of those expressly given.

The action of the Executive department rested on the same ground. Its uniformly declared policy, as already shown, whenever the question arose requiring Executive action, was to treat the legal tender quality of the Treasury notes as a temporary expedient, necessary as a means of averting national destruction, but otherwise unjustifiable.

The Judicial department went no further in the decision last above cited.

Of the ten eminent members of this court, before whom the question was argued, five deny the existence in Congress of any constitutional power to give to Treasury notes a legal tender quality for the payment of debts, and five assert and sanction the power as exercised in 1862 and 1863 by the passage of the so called Legal Tender Acts in those years of the war.

In the retrospect and review of this sharp conflict of judicial opinion in which the voices of the members of this court are equal, it is noteworthy that the learned judges and jurists who condemned the Acts of 1862 and 1863, did so upon grounds which wholly prohibited Congress from ever exercising the power exerted by those avowedly WAR MEASURES.

This was a conclusion not consonant with the general sentiment of the people, as shaped during the life and death struggle of the Civil War, and as expressed by that class of their representatives most capable of formulating it intelligently, the judges of their highest State courts.

In a large majority of the States represented in the Thirty-seventh Congress (1861–1863) the question of the constitutionality of the legal tender clauses of the acts of 1862 and 1863 had arisen in various cases of private contract, and had been passed upon in many instances after much deliberation and research, by the judges of the courts of last resort.

These courts, by votes of the majority of the members composing them, and in some instances with the concurrence of all the judges, had declined to introduce into the transactions of the people and the affairs of the country any such embarrassment as might result from decisions of State courts, that a currency, created in view of a great national emergency, and which for several years had practically constituted the money of the country, was unauthorized and invalid. In only two States, New Jersey and Kentucky, were final decisions rendered adverse to the validity of the legal tender provisions of the acts. (*See* 20 N. J. Eq., 421; 2 Duvall, Ky., 26.)

This unanimity of decision in the State courts will be found on an examination of the reported cases to have been due in part to a proper reserve and hesitation in passing upon constitutional questions as to which the Federal judiciary was the ultimate arbiter, in any other way than to sustain, if possible, the authority of Congress. But it was also very largely due to the sentiment that the denial to Congres of the power in question under such circumstances

as those in which it had actually been exercised, would be fraught with more danger than to uphold and sanction it.

(*See the various cases involving the question of the constitutionality of the Legal Tender acts*, 45 New Hamp., 434; 39 Vermont, 46; 14 Allen (Mass.); 389; 27 New York, 400; 52 Penn. St. (2 P. F. Smith), 9; 23 Indiana, 164; 13 Mich., 303; 18 Wisc., 140; 1 S. Car., 147; 4 Heiskell (Tenn.), 385; 16 Minn., 136; 18 Iowa, 174; 38 Missouri, 138, 458; 1 Nevada, 271; 25 Calif., 404.)

In no one of the cases in the State courts was anything decided save the validity of the legal tender clauses of the particular acts in question, and under the application of the well settled rules which governed the inquiry, the time, circumstances and objects which stood connected with the acts, were prominent and important in the judicial consideration of their validity.

Accordingly, when the alternative was presented of conceding the constitutionality of the legal tender clauses or denying to Congress, in any contingency, such a supposed means of self-preservation, the refusal to deny the power was dictated, in advance, by the patriotic sentiment of the period, and this may fairly be said to have turned the scales of justice in favor of the power.

And so in the opening sentences of the opinion of this court by which the legal tender clauses were at last upheld and the former conclusion of the court annulled, this loyal sentiment finds expression and gives form and substance to all that follows in the argument by which the power is sanctioned.

The court say:

"If it be held by this court that Congress has no con-
"stitutional power under any circumstances, or in any
"emergency, to make Treasury notes a legal tender for the
"payment of all debts (a power confessedly possessed by
"every independent sovereignty other than the United
"States), the Government is without those means of self-
"preservation which, all must admit, may, in certain con-

"tingencies, become indispensable, even if they were not "when the acts of Congress now called in question were "enacted."

The learned justice, delivering the opinion of the court, then argues that the powers given by the Constitution to Congress include every means, not prohibited, necessary for the preservation of the Government, although not expressly given, or not ancillary to any single enumerated power. He instances legislation "even in times of peace, "and in the absence of any trying emergency," to carry into effect the great objects for which the Government was framed, and he states the inquiry in reference to the legal tender acts to be "whether they were, when enacted, ap- "propriate instrumentalities for carrying into effect or exe- "cuting any of the known powers of Congress, or of any "department of the Government.

"Plainly to this inquiry," the learned justice proceeds, "a consideration of the time when they were enacted, and "of the circumstances in which the Government then stood, "is important. It is not to be denied that acts may be "adapted to the exercise of lawful power, and appropriate "to it, in seasons of exigency, which would be inappropriate "at other times."

Then follows a graphic summary of the distressing condition of the country at the time of the passage of the legal tender acts. "A raging civil war;" the threatened "overthrow of the Government, and the destruction of the Constitution;" the demand of armies, navies and moneys to an extent beyond all ordinary sources of supply; the public treasury "nearly empty;" the credit of the Government almost "exhausted;" specie payment suspended; taxation inadequate even for interest on the existing debt; "the army unpaid," "and a score of millions of dollars" "due to the soldiers in the field;" the current war expenditure "over one million dollars per day;" all the coin in the country insufficient for three months' supplies, "had it all been poured into the Treasury;" foreign credit destroyed; an impending paralysis of trade and business, with a threatened "loss of confidence" in the ability of the Government to "maintain its continued existence."

In the concurring opinion of Mr. Justice BRADLEY, the power of Congres to authorize the issue of Treasury notes when necessary, and as an incident of that power to make Treasury notes a legal tender, the learned justice says:

The power to make Treasury notes a legal tender, whilst "a mere incidental one to that of issuing the notes themselves, and to one of the forms of borrowing money, is "nevertheless a power not to be resorted to except under "extraordinary and pressing occasions, such as war or other "public exigencies of great gravity and importance, and "should be no longer exerted than all the circumstances of "the case demand."

"I do not say that it is a war power, or that it is only to "be called into exercise in time of war, for other public "exigencies may arise in the history of a nation which may "make it expedient and imperative to exercise it. But of "the occasion when, and of the times how long, it shall be "exercised and in force, it is for the legislative department "of the Government to judge. Feeling sensibly the judg-"ments and wishes of the people, that department cannot "long (if it is proper to suppose that within its sphere it "ever can) misunderstand the business interests and just "rights of the community."

In the earlier case of *Hepburn* v. *Griswold*, Mr. Justice MILLER, in the dissenting opinion of the minority of the court, had rested the constitutionality of the act largely upon the authority of the memorable case of *McCulloch* v. *The State of Maryland* (4 Wheat., 316), in which the court, by Chief Justice MARSHALL, declared the power of Congress to embrace all necessary means for the ends it was authorized to accomplish, accompanying the declaration by a definition of the word "necessary," as intended to refer to whatever might insure the beneficial execution of the power of the Government in the various crises of human affairs, and the learned justice then states the question to be, "Does there exist, then, any power in Congress, or in "the Government, by express grant, in the execution of "which this legal tender act was necessary and proper in "the sense here defined *and under the circumstances of its* "*passage*."

*Hepburn* vs. *Griswold*, 8 *Wall*, *pp.* 631, 632.

The learned justice then reviews the circumstances, and says:

"The legal tender clauses of the statutes under consider "ation were placed emphatically by those who enacted "them, upon their necessity to the further borrowing of "money and maintaining the army and navy. It was done "reluctantly and with hesitation, and only after the neces- "sity had been demonstrated and had become imperative. "Our statesmen had been trained in a school which looked "upon such legislation with something more than distrust. "The debates of the two Houses of Congress show, that on "this necessity alone could this clause of the bill have been "carried, and they also prove, as I think, very clearly the "existence of that necessity. The history of that gloomy "time, not to be readily forgotten by the lover of his coun- ". try, will forever remain the full, clear and ample vindica- "tion of the exercise of this power by Congress, as its re- "sults have demonstrated the sagacity of those who origi- "nated and carried through this measure.

"Certainly, it seems to the best judgment that I can "bring to bear upon the subject that this law was a neces- "sity in the most stringent sense in which that word can be "used."

## III.

Resuming the order of the narrative, we find the decision in the *Legal Tender cases* afterwards approved in the case of *Dooley* v. *Smith*, 13 Wall, 604. The question arose upon a motion to dismiss a writ of error to the Court of Appeals of the State of Kentucky, in a case in which the decision in the State courts was against the validity of the legal tender acts.

This court reversed the judgment, saying:

"The recent decision here, overruling *Hepburn* v. *Griswold*, "and holding these notes to be a valid tender in payment of "contracts made before the enactment of the legal tender "statutes, as well as those made since, decides the case be- "fore us on the merits, and dispenses with further argu- "ment."

Thus, in the space of a single decade, the expedient of providing funds for the prosecution of a civil war, declared by

this court to be " the greatest known in the history of the human race " (*Prize cases*, 2 Am. Law Reg., N. S., 339), by making the notes of the United States a legal tender; an expedient reluctantly resorted to by the Legislative department as a " temporary expedient," and reluctantly assented to by the Executive department, and repeatedly declared by it to be no longer permissible as a permanent system, has been twice subjected to the scrutiny of the Judicial department, at first condemned by five voices from its Supreme Bench, and then upheld by an equal, but not greater, number of voices from the same Supreme Bench, resulting in this and nothing more, that the legal tender provisions of the Acts of 1862 and 1863, as they stand on the statute book in those acts, are adjudged to have been a valid exercise of a power conferred on Congress by the Constitution, necessary under the circumstances in which it was exercised.

It cannot escape the observation of any candid student of the history of this subject, that the opponents of the power of Congress to give a legal tender quality to Treasury notes have been at all times united and consistent in their grounds of opposition.

Starting with the undisputed proposition as laid down by this court, speaking through Chief Justice MARSHALL (*Martin* v. *Hunter's Lessee*, 1 Wheat., 326), that " the Government " of the United States can claim no powers which are not " granted to it by the Constitution, and the powers actually " granted must be such as are expressly given, or given by " necessary implication," they have maintained:

That the power to make anything, except gold and silver, a legal tender for the payment of debts, prohibited by the Constitution to the States, is not granted by express terms to Congress, and in the light of history cotemporaneous with the adoption of the Constitution, was not intended to be granted.

That if it exists it must therefore be derived and spelled out as a power implied in, or deducible from, some of the express powers actually granted to Congress.

That it cannot reasonably be so derived, because it is not

to be deduced from the express power "to coin money and regulate the value thereof," a paper currency being in itself a contradiction of the term "money," and cannot, by logic or by regulation of law, any more than by magic, be turned into money. Nor from the express power "to borrow money," because this power gives no authority to any debtor, citizen or sovereign, to change the standards of value, or to give greater currency to promises to pay by declaring their enforced substitution as money between third persons not concerned in the act of borrowing. Nor from the grant of power "to declare war, and to raise and support armies and navies," because the wants of the Government in any particular department cannot be made the measure of its powers where those powers are restricted by constitutional limits. Nor can it be derived from the general grant of power to make "all laws necessary and proper" for carrying into effect the other powers vested in Congress by the Constitution, because the exercise of this particular power was not a means necessary or appropriate to the execution of any of the powers expressly delegated, because it never inhered in the delegated sovereignty of the Federal Government, and because the doctrine of resulting powers to be exercised at will would turn the Government from one of limited power into one of unlimited power, lodged in a single department, in respect to a vital element of the national existence.

To all this the opponents of the power added the admitted evils of a paper currency with a legal tender attribute, the intrinsic bad faith, and the attendant impairment of the obligation of public and private contracts, resulting from its creation, and an absolute denial of the fact that the legal tender attribute was ever an imperative necessity.

Such are the main positions taken against the power of Congress by all the opponents of legal tender treasury notes as contained in the arguments of counsel in the reports, State and Federal, in the debates of Congress, in the works of jurists, and in the discussions of publicists.

On the other hand, no concurring and consentaneous answer has been given by those statesmen, publicists

jurists or judges, who have upheld, in discussion or in judicial decision, the existence of the power, and the right of Congress to exercise it, except on the ground and upon the plea of necessity.

Reduced to their final terms, all the arguments in support of the power come to this, that the extreme needs of a constitutional Government may require extreme measures for its preservation; that the power of self-preservation and self-perpetuation must be commensurate with such needs, and that where all the powers of the Government are given by a written Constitution, this power must, if not expressly written on its face, be necessarily intended by what is there written, and that either as an incident to some enumerated power, or as a resultant from the aggregate of all the powers granted, and as a necessary means appropriate to carry into effect those which are enumerated, this power must have been intended, if the framers of the Constitution meant that the Government they formed should have in it the means of protection against all emergencies, and was to live and not die.

And in view of the greatness of the peril and the sore extremity of the country, when the power was resorted to as a supreme need, the duly constituted judicial authority has declared, without the absolute concurrence of its members in any one ground for the declaration, that the legal tender clauses of the Acts of 1862 and 1863, as therein expressed, are a part of the law of the land.

## SECOND POINT.

**The course of Congressional legislation, since the decision of the Legal Tender Cases, culminating in the Act of May 31, 1878, which compels a post-redemption issue of the so-called "Legal Tender notes," raises for the first time the question of the power of Congress to direct the issue of United States notes as currency, with the quality of legal tender, in time of peace, and in the absence of any public exigency.**

### I.

Since the decision of the *Legal Tender Cases*, the action of the Government in respect to United States notes, has been confined to Congress and the Treasury Department.

### 1874.

Early in this year Congress passed the so-called "Inflation Bill," a sequel of the financial disasters of 1873, which authorized a large increase of the greenback circulation. The veto of the President prevented this bill from becoming a law. The veto message of April 22, 1874, declared the provisions of the bill to be "a departure from the true prin-
"ciples of finance, natural interest, national obligations to
"creditors, congressional promises, party pledges by both
"political parties * * * and promises made in every
"annual message and in each inaugural address" of the President vetoing the bill (*Veto Message, Cong. Record*, 1874, *vol.* 2, *Part* 4, *p.* 3270).

By the act of June 20, 1874, "*fixing the amount of United States notes*," *&c.*, it was provided as follows:

Sec. 6.—"That the amount of United States notes out-

" standing and to be used as a part of the circulating " medium, shall not exceed the sum of three hundred and " eighty-two million dollars, which said sum shall appear in " each monthly statement of the public debt, and no part " thereof shall be held or used as a reserve."

18 *Stats. at Large*, 123.

By the revision of the Statutes of the United States in 1874, the original Legal Tender Acts of 1862 and 1863 were repealed, and the following provisions enacted:

Sec. 3571.—" United States notes shall be of such denomi- " nations, not less than one dollar, as the Secretary of the " Treasury may prescribe, shall not bear interest, shall be " payable to bearer, and shall be in such form as the Secre- " tary may deem best."

Sec. 3575.—" The Secretary of the Treasury may provide " for the engraving and preparation, and for the issue of " fractional and other notes, and shall make such regulations " for the redemption of such notes when mutilated or de- " faced, and for the receipt of fractional notes in payment " of debts to the United States, except for customs, in such " sums, not over five dollars, as may appear to him expe- " dient."

Sec. 3579.—" *When any United States notes are returned to " the Treasury, they may be reissued, from time to time, as the " exigencies of the public interest may require.*"

Sec. 3580.—" When any United States notes returned to " the Treasury are so mutilated or otherwise injured as to " be unfit for use, the Secretary of the Treasury is author- " ized to replace the same with others of the same character " and amounts."

Sec. 3581.—" Mutilated United States notes, when re- " placed according to law, and all other notes which by law " are required to be taken up, and not reissued, when taken " up, shall be destroyed in such manner and under such " regulations as the Secretary of the Treasury may pre- " scribe."

Sec. 3582.—"The authority given to the Secretary of the "Treasury to make any reduction of the currency, by re- "tiring and canceling United States notes, is suspended."

Sec. 3588.—"*United States notes shall be lawful money, and "a legal tender in payment of all debts, public and private, "within the United States, except for duties on imports and in- "terest on the public debt.*"

"Sec. 3589.—Demand Treasury notes, authorized by the "Act of July seventeen, eighteen hundred and sixty-one, "chapter five, and the Act of February twelve, eighteen "hundred and sixty-two, chapter twenty, shall be lawful "money and a legal tender in like manner as United States "notes."

"Sec. 3590.—Treasury notes, issued under the authority "of the Acts of March three, eighteen hundred and sixty- "three, chapter seventy-three, and June 30, eighteen hun- "dred and sixty-four, chapter one hundred and seventy-two, "shall be legal tender to the same extent as United States "notes for their face value, excluding interest. *Provided* "that Treasuary notes issued under the act last named shall "not be a legal tender in payment or redemption of any "notes issued by any bank, banking association or banker "calculated and intended to circulate as money."

## 1875.

On January 14, 1875, the act to provide for the "resump- tion of specie payments," was approved.

It provided that the volume of the legal tender currency should be contracted before January 1, 1879, to $300,000,000, and then proceeds as follows:

"And on and after the first day of January, Anno Dom- "ini eighteen hundred and seventy-nine, the Secretary of "the Treasury shall redeem in coin the United States legal "tender notes then outstanding, on their presentation for "redemption, at the office of the Assistant Treasurer of the "United States, in the City of New York, in sums of not "less than fifty dollars.

"And to enable the Secretary of the Treasury to prepare "and provide for the redemption in this act authorized or "required, he is authorized to use any surplus revenues,

"from time to time in the Treasury, not otherwise appro-
"priated, and to issue, sell and dispose of at not less than
"par, in coin, either of the descriptions of bonds of the
"United States described in the Act of Congress approved
"July fourteenth, eighteen hundred and seventy, entitled
"An Act to authorize the refunding of the national debt,
"with like qualities, privileges and exemptions to the extent
"necessary to carry this act into full effect, and to use the
"proceeds thereof for the purposes aforesaid.

"And all provisions of laws inconsistent with the provis-
"ions of this act are hereby repealed."

*U. S. Stats. at Large, vol.* 18, *p.* 296, *sec.* 3.

## 1878.

Shortly after the commencement of the session in December, 1877, Congress was agitated by conflicting schemes for the repeal or modification of the Resumption Act and for preventing any reduction in the volume of the paper money currency.

A bill for the practical repeal of the Resumption Act was introduced in the House of Representatives and was pending at the close of the year.

January 15, 1878, a bill was introduced into the House of Representatives by Mr. Springer, of Illinois, "to prevent the further contraction of the currency." It provided that the volume of the legal tender notes should not be contracted or reduced below $350,000,000, and that any surplus of such notes, received or redeemed by the Government, that may be in the Treasury at any time in excess of the sums required to meet appropriations, should be reissued for the purchase of coin or outstanding bonds (*Cong. Rec.*, 1878, *p.* 341). Unanimous consent to its immediate consideration was asked; Mr. Garfield, of Ohio objected, and it was referred to the Committee on Banking and Currency (*Id.*).

On January 30, 1878, a bill was introduced into the House by Mr. Hays of Illinois, prohibiting any further destruction of legal tender notes, and making such notes a legal tender for customs duties. The bill was referred to the same committee (*Id.*, *p.* 670).

On April 29, 1878, a bill "to forbid the retirement of legal tender notes," was introduced by Mr. Fort, of Illinois, and, on his motion, the rules of the House were suspended by a two-thirds vote, and the bill was passed without debate (*Id.*, *pp.* 2928, 2929). On May 6, 1878, the bill was received in the Senate and laid on the table; on May 7, 1878, it was taken up and read a second time, and on May 8, 1878, referred to the Committee on Finance, which reported it favorably May 21, 1878.

On May 28, 1878, the bill was before the Senate; Mr. Bayard, of Delaware, offered as an amendment a proviso as follows: "*Provided*, that the said notes, when so issued, shall "be receivable for all dues to the United States, except "duties on imports, *and not otherwise to be a legal tender*, and "any reprint of the said notes shall bear this superscrip- "tion." This amendment was supported by the Senator who introduced it by an extended argument against the constitutionality of the power of Congress to create or continue a legal tender currency. A brief debate ensued, the amendment was rejected, and on the same day the bill passed by a vote of 41 to 18 (*Id.*, *pp.* 3183, 3227, 3228, 3257, 3596, 3861, 3871).

May 31, 1878, the bill was approved and signed by the President.

The following is the text of the act:

"*An Act to forbid the further retirement of United States* "*legal tender notes.*

"*Be it enacted by the Senate and House of Representatives of* "*the United States of America, in Congress assembled*, That "from and after the passage of this act it shall not be lawful "for the Secretary of the Treasury, or other officer under "him, to cancel or retire any more of the United States "legal tender notes, and when any of said notes may be re- "deemed or be received into the Treasury, under any law, "from any source whatever, and shall belong to the United "States, they shall not be retired, canceled or destroyed; "but they shall be reissued and paid out again, and kept in "circulation; *Provided*, that nothing herein shall prohibit "the cancellation and destruction of mutilated notes and the

" issue of other notes of like denomination in their stead, as " now provided by law.

" All acts and parts of acts in conflict herewith are hereby " repealed."

*U. S. Stats. at Large, Vol. 20, p. 87.*

## II.

The act of May 31, 1878, as passed, was in consonance with the views expressed by the Secretary of the Treasury in his report of December, 1877. Treating section 3579 of the Revised Statutes (*ante, p.* 34), not as a re-enactment of the provisions as to reissue of the United States notes authorized by the Legal Tender Acts of 1862 and 1863 to continue in force only so long as those notes were unredeemed, but as a permanent provision of law, unaffected by the Resumption Act and its repealing clause, he said:

" No distinct legislative declaration is made in the Re- " sumption Act that notes redeemed * * shall not be re- " issued, but section 3579 of the Revised Statutes of the " United States provides that when any United States " notes are returned to the Treasury, they may be reissued " from time to time, as the exigencies of the public interest " may require."

He then proceeds to express the opinion that a note redeemed with coin is in the Treasury subject to the same law "as if received for taxes, *or as a bank note when redeemed ' by the corporation issuing it*," and on these premises he argues that although the Government cannot, like a banking corporation, loan money, deal in bills of exchange or make advances on property, that function of banking which relates to providing a circulating medium can be performed by it.

As to the legal tender quality, he said:

" The legal tender quality given to United States notes " was intended to maintain them in forced circulation at a " time when their depreciation was inevitable. *When they* " *are redeemable in coin this quality may either be withdrawn* " *or retained* without affecting their use as currency in ordi-

" nary times. But all experience has shown that there are " periods when, under any system of paper money, however " carefully guarded, it is impracticable to maintain an ac- " tual coin redemption. Usually contracts will be based " upon current paper money, and it is just that during a " sudden panic, or an unreasonable demand for coin, the " creditor should not be allowed to demand payment in any " other than the currency on which the debt was contracted. " *To meet this contingency* it must seem to be right to main- " tain the legal tender quality of the United States notes. If " they are not at par with coin it is the fault of the Govern- " ment and not of the debtor, or, rather, it is the result of " unforseen stringency not contemplated by the contracting " parties."

While the Act of May 31, 1878, did not call forth extended discussion in Congress, the bill, pending at the same time, to repeal all that portion of the Resumption Act of 1875, which provided for the redemption and retirement of the greenback circulation, was the subject of repeated debate covering the whole question of the power of Congress in reference to the national currency. This bill failed of final passage, owing to non-concurrence by the House of Representatives in amendments proposed by the Senate. The discussions in the two houses turned on the vexed question of the power of Congress to impress the legal tender attribute upon the Treasury notes.

A *via media* was proposed in the Senate by Senator Matthews, of Ohio, by the introduction of a bill in the nature of a substitute for the proposed measure. It embodied a scheme for a gradual retirement of the outstanding currency, and was supported by its author, in an elaborate argument, as a better method of dealing with the subject, because " committing no one to the perpetual maintenance of the " legal tender quality and circulating power of the Treasury " notes, maintaining them only because now is not the " proper time to dispense with them."

Mr. Calhoun was referred to in the argument as an authority for the proposition that " the best paper currency " in the world is a Treasury note circulation, to be received " at the will of the party to whom it is offered by the Gov- " ernment, and redeemable in gold and silver " (*Cong. Rec.*, 1878, *p.* 3494), but in reference to this the admission was made

that the "legal tender feature played no part in the discus-
"sion," and was "expressly excepted as between the Gov-
"ernment and the party to whom it was offered."

The discussion of the question of the constitutional power of Congress was proper and pertinent in reference to the bill to repeal the provision of the Resumption Act as to redeeming the legal tender treasury notes, because, if repealed, the provisions of the Revised Statutes making those notes, which were evidences of debt then existing, a legal tender, would have continued in full force. The Act of May 31, 1878, did not repeal or modify any of the provisions of the Resumption Act. On the contrary, it expressly assumed that the outstanding legal tender notes would be paid off and redeemed and *belong to the United States*. It properly described them as "legal tender notes," for they were such, until they were redeemed and paid, but thereafter, unless some existing public exigency required, they could not have been reissued under the Revised Statutes. The Resumption Act had declared that after January 1, 1879, no such exigency would exist, and required the notes to be paid off and not again issued.

The year 1878 was one of exceptional prosperity.

On June 30, 1878, less than thirty days after the passage of the Act of May 31, the outstanding principal of the public debt of the United States was, in round numbers, $2,250,000,000, of which less than ten per cent. was held in Europe, against $2,680,000,000 at the close of the war in 1865 (*Appleton's Annual Cyclopædia*, 1878. *Article, Finances of the U. S., pp.* 324, 325).

The funding measures in actual operation were rapidly reducing the rate of interest on the entire debt. The reserve of coin required by the Resumption Act to be accumulated in the Treasury, in advance of January 1, 1879, to the amount of at least forty per cent. of the outstanding United States notes, was in process of acquisition, and actually reached the required amount in November, 1878 (*Report Secretary of the Treasury, Dec.*, 1878).

The net revenues for the fiscal year exceeded the ordinary expenditures during the same period $20,000,000 and

upwards. Products of the soil and of the mines of the country were most abundant. The corn crop of 1878 was 30,000,000 of bushels in excess of that of 1877. The oat crop was the largest ever raised in this country. There was more cotton, more wheat, more corn and more pork to export than at any previous time in our history, and the products of our mines and fields "overflowed to all parts of the world" (*Appleton's Cyclopedia. Article, "United States," pp.* 806, 809).

The signs of permanent prosperity inspired universal hopefulness, which the events of succeeding years fully justified, the surplus revenues having largely increased until for the fiscal year ending June 30, 1881, they reached $100,000,000, and for the fiscal year ending June 30, 1882, $145,000,000.

## 1879.

On January 1, 1879, the resumption of specie payments began, and all the United States notes then and since presented for redemption in coin, in the manner provided by the resumption act, have been paid.

The amount of the public debt outstanding January 1, 1879, represented by the legal tender notes, was $346,681,016.

Under the construction given by the Treasury Department to section 3579 of the Revised Statutes (*ante, p.* 34), coupled with the Act of May 31, 1878, all the United States notes returned into the Treasury, as worn and mutilated notes, as well as those redeemed in coin, are treated in the report of the Treasurer of the United States as "redeemed," and during each year since the passage of the Act of May 31, 1878, there have been issued and paid out by the Treasury department, the precise amount in United States notes, which have been so "redeemed," but not in notes of the same denominations.

Tables taken from the reports of the Treasurer of the United States for 1881 and 1882, show the "redemptions" and "issues" for the years since the Resumption Act took

effect; and the actual redemptions in coin of the legal tender notes, and the entire issues and redemptions from August 26, 1861 to June 30, 1882.

*See Appendix, Post, pp. 74–78.*

It is apparent from these tables and statements, that in practice, under the operation of the Act of May 31, 1878, the United States notes which come into the Treasury in any way, are all treated as "redeemed," and that issues of notes are continuously made, to keep the volume of the paper currency up to the full amount of $346,681,016, outstanding January 1, 1879.

This is done without reference to any question of exigency or of public interest, or the exercise of any discretion on the part of the Treasury Department or any of its officers, who are expressly prohibited from exercising any such discretion.

No provision of any act, which applied to the original Treasury notes or to their reissue in case of exigency, is made applicable to the redeemed notes.

It is simply provided that they shall be "paid out and kept in circulation," and if it be claimed that they shall again, in the absence of any exigency so requiring and of any express direction, have the legal tender quality, it can only be because they are described in the title and in the descriptive clause of the Act of May 31, 1878, as "United States legal tender notes," and because section 3579 and 3588 of the Revised Statutes declare that United States notes may be reissued and shall be a legal tender.

Such a conclusion can be reached only by holding that Congress has the power to direct the reissue of redeemed Treasury notes, as well as worn or mutilated notes, or those returned and not redeemed, and to continue their legal tender quality, without reference to any public exigency, at its own will and pleasure.

## THIRD POINT.

**The Act of May 31, 1878, taken in connection with the unrepealed provisions of the Resumption Act requiring the *redemption in coin*, on and after January 1, 1879, of all the United States legal tender notes then outstanding, can be upheld as a constitutional exercise of power only by construing it to require a new issue of such notes, after redemption, as a circulating medium, without the quality of legal tender.**

I.

The Resumption Act, passed January 14, 1875, required all the United States legal tender notes outstanding January 1, 1879, to be REDEEMED IN COIN, on presentation on and after that date (*ante*, *p.* 35).

It repealed all "provisions of law, inconsistent" with its own provisions (*Id.*).

The only "provisions of laws" relating to the United States legal tender notes which were in force January 14, 1875, were sections 3,571, 3,579, 3,582 and 3,588 of the Revised Statutes (*ante*, *pp.* 34, 35).

All previous laws had been repealed.

The Revised Statutes contain and express the whole statute law of the United States as it was on December 31, 1873.

*U. S.* vs. *Bowen*, 100 U. S., 508.
*Arthur* vs. *Dodge*, 101 *Id.*, 34.
*Victor* vs. *Arthur*, 104 *Id.*, 498.

The provisions of the Resumption Act applied to the same United States legal tender notes to which the above cited sections of the Revised Statutes applied. It directed the same notes to be REDEEMED IN COIN.

The Resumption Act contained no saving clause or qualification as to any further or future use of the notes, after their redemption. It necessarily superseded and repealed the provisions of sections 3579 and 3582 of the Revised Statutes (*ante, pp.* 34, 35) providing for reissue, and suspending the authority to retire and cancel.

To "redeem" is, according to commercial signification, "to receive back by paying the obligation, as any promissory note, bond, or other evidence of debt, given by "the State, by a company, or corporation, or by an individual."

*Webster's Dictionary*, "*Redeem.*"

That the word was used in the Resumption Act in its ordinary signification of absolute fulfillment of the promise to pay, expressed in the United States notes, cannot be questioned. The REDEMPTION of the Government paper in COIN meant the retirement and extinguishment of so much of the debt as it represented.

II.

VIEWED AS EVIDENCES OF DEBT the United States notes outstanding, January 1, 1879, constituted a part of the entire public debt, and were reported as such, as provided by the Act of June 20, 1874, sec. 6, (*ante, p.* 34). The redemption of the notes in coin would discharge so much of the debt as was represented by the notes redeemed. In the absence of express legislation providing for a renewal of the debt so discharged, it would be extinguished by the act of redemption. The notes redeemed would come into the Treasury as paid obligations.

If the legal tender quality was an incident to the notes, an element of the FORCED WAR LOAN which they represented, imposed by Congress in the exercise of a power justified only by the public exigency, as a means of compelling their acceptance as a debt paying medium, and thus creating an additional security for the loan, then, upon the payment of

the notes and the satisfaction of the debt, of which they were the evidence, the incident of the legal tender quality was discharged under the operation of the principle of law, that when a debt is paid any incidental or collateral security is thereby released.

*Biebinger* vs. *Continental Bank*, 99, *U. S.*, 143.

In *Marvin* vs. *Vedder*, 5 *Cow.*, 671, the Court of Errors of New York held, that the payment by a mortgagor to a mortgagee of a sum of money due on the mortgage, without any receipt or endorsement, operated as a payment, although, within a few days thereafter, the mortgagee returned the money to the mortgagor, under an agreement that the mortgage should remain outstanding; payment having been made, the lien of the mortgage was discharged to that extent, and could not be restored by any subsequent agreement between the parties.

*See also*, *De la Vergne* vs. *Evertson*, 1 Pai., 181.
*Banta* vs. *Garmo*, 1 Sandf. Chy., 383.

The redeemed notes in the hands of the Treasury officers would not be notes "returned," which, under section 3579 of the Revised Statutes, might be reissued; nor would they be "lawful money" or a "legal tender," under section 3588, because, being paid off, the promise and obligation which they expressed were discharged, and could not be revised, except by the creation of a new debt, which Congress alone could authorize and which it has not authorized.

The Resumption Act did not require the redeemed notes to be canceled or destroyed. Hence they would remain in the Treasury as paid-off obligations. The suggestion of the Secretary of the Treasury, that they were available for reissue under section 3579, of the Revised Statutes, as notes "returned" in the ordinary course of business (*ante*, *p.* 34), is without support of law, unless the Resumption Act is to be construed to mean only that the notes are, on and after January 1, 1879, to be convertible into coin without being redeemed in the sense of being paid off and extinguished as evidences of debt.

It was these "redeemed" notes which the Act of May 31, 1878, directed the Secretary of the Treasury to reissue, pay

out again and keep in circulation. The act expressly applies to notes which have been "REDEEMED" and "shall belong to the United States" (*ante*, *p.* 35).

When Congress, by the Resumption Act, provided for the REDEMPTION IN COIN of these notes, on and after a prescribed future day, repealing all provisions of former acts inconsistent with this mandate, it contemplated the extinguishment of the debt by the payment, in real money, after more than a decade and a half, of the forced war loans of 1862 and 1863, kept alive during all this period in the form of a paper currency, redeemable only in paper. Manifestly, if all the outstanding notes had thus been actually redeemed and paid off, no new debt in the form of United States notes which Congress might have authorized, would have contained the legal tender element, in the absence of a declaration by Congress to that effect, equally plain and explicit as that of the Legal Tender Acts of 1862 and 1863.

The Act of May 31, 1878, is the sole warrant for the use of these redeemed United States notes. Without its authority the Treasury Department could not lawfully have used them in any transaction.

Was it the intention of Congress, in directing a POST-REDEMPTION issue of the United States legal tender notes, to re-create and continue so much of the war debt as the notes had represented before redemption, and with such new creation to revive and perpetuate the original quality of legal tender? If so, the intent is not expressed in plain terms, and can only be implied.

There is no provision in the act that the notes, when again issued, paid out and put in circulation, shall be a legal tender for any purpose. If it was the intent of Congress that they should be a legal tender, it is only to be implied from the fact that the notes are described in the act as "United States Legal Tender notes," and that the notes contain an endorsement that they are a legal tender for debts.

But the repeal by the Resumption Act of all the statutes which created or continued the legal tender element of the

Treasury note currency (including section 3579 of the Revised Statutes), was as absolute as the provision for the redemption of that currency, and the fact of redemption, in respect to every note redeemed, executed the law, and worked *pro tanto* a discharge of the debt with all its incidents.

The Act of 1878 did not attempt to continue the existing debt, because it contemplated the redemption of the notes given for the debt. It described them according to their well known and statutory designation as "legal tender notes," and it directed their use after redemption as obligations of the Government and as a circulating medium, but without any re-enactment of the legal tender provisions which applied to the notes before their redemption. The general repealing clause of the act, "All acts and parts of "acts in conflict herewith are hereby repealed," does not revive the legal tender clauses, because (1) there is no conflict between an act authorizing treasury notes to be used as a circulating medium, and another act prohibiting their use as a legal tender, and (2) the act itself, by applying its provisions to "redeemed" notes, must be deemed to be consistent with and not in conflict with the Resumption Act.

III.

VIEWED AS A CIRCULATING MEDIUM, the United States notes are none the less evidences of debt. If the Act of May 31, 1878, was a scheme to maintain the currency of United States notes, notwithstanding the provisions of the Resumption Act, and notwithstanding the actual redemption of the notes, the fact remains that the course of dealing by the Treasury Department, directed and required by the act, involves, necessarily, a new loan by the use of the redeemed notes, and if the legal tender quality was intended to be an incident of such new use, the real transaction attempted was a new forced loan, and nothing else.

The notes of the post-redemption issue directed to be paid out and kept in circulation by the Act of May 31, 1878, are

identical in terms, and equivalent in amount, though not in denomination (*post*, *p.* 74), with those issued and reissued under the Legal Tender Acts of 1862 and 1863, and under the Revised Statutes.

They are promises to pay money, and while, like bank notes, they circulate as money, they are, like them, in legal effect, simply promissory notes of the United States.

"Bank notes are promissory notes. * * Both in Eng-
"land and here, bank notes, for some purposes, are considered
"money; but in both countries the remedy upon them is
"the same as upon promissory notes by individuals."

*per* SAVAGE, *Ch. J.*, in *Haxtun* v. *Bishop*, 3 Wend, 14.

The precise character and functions of these United States notes, aside from the quality of legal tender, were declared by this court in *Bank* v. *Supervisors*, 7 Wall 26 (*ante*, *p.* 13), where the right of the States to tax them was denied. There was no dissent by any member of the court from the opinion of the Chief Justice, in which it was said:

"In December, 1861, the State banks (and no others then
"existed), suspended payment in coin; and it became
"necessary to provide by law for the use of State bank
"notes or to authorize the issue of notes for circulation
"under the authority of the National Government. The
"latter alternative was preferred, and in the necessity thus
"recognized originated the legislation providing at first for
"the emission of United States notes, and at a later period
"for the issue of the National bank currency. The period of
"payment was left to be determined by the public exigencies
"* * making the whole amount authorized four hundred
"and fifty millions, and contemplating a permanent circula-
"tion UNTIL RESUMPTION OF PAYMENT IN COIN of four
"hundred millions of dollars" (*p.* 29.)

And, further, the court say: "It is clear that these notes
"were intended to circulate as money and, with the National
"bank notes, to constitute the CREDIT CURRENCY of the
"country."

But the court held, that the notes were also "obligations
"of the United States. Every one of them expresses upon
"its face an engagement of the nation to pay to the bearer

" a certain sum: The dollar note is an engagement to pay " a dollar, *and the dollar intended is the coined dollar* of the " United States ; a certain quantity in weight and fineness " of gold and silver, authenticated as such by the stamp of " the Government" and as such "obligations," they were held to be " strictly securities," and alike with Government stocks, exempt from taxation (*pp.* 30, 31).

The Resumption Act directed the redemption in coin of the notes outstanding January 1, 1879. And in fact every note of the description known as legal tender notes and of the character described in the opinion in *Bank* v. *The Supervisors*, which has been presented for redemption in accordance with that act, has been redeemed ; the promise and engagement which, as defined by this court, it bore upon its face, has been fulfilled. As an obligation, it has been discharged. As a United States note outstanding on January 1, 1879, it no longer exists. The Resumption Act directed absolute redemption. It contains no provision requiring or authorizing the same note to be redeemed or paid more than once. Nor does the Act of May 31, 1878, as to any note issued after having been once redeemed, require or direct it to be ever paid in coin, but, on the contrary, directs that it be issued again, paid out and kept in circulation indefinitely. There is no statute which declares or provides that notes of this post-redemption issue set afloat under the Act of May 31, 1878, shall ever be redeemed in coin.

The Resumption Act does not so declare (*ante*, *p.* 35).

The Act of May 31, 1878, does not so declare (*ante*, *p.* 37).

Section 3588 of the Revised Statutes declares generally that United States notes shall be lawful money and a legal tender in payment of all PUBLIC DEBTS, except interest on the public debt. If this section is in full force and applies to the POST-REDEMPTION issue, then these are lawful money and may be used to pay the public debt evidenced by any note outstanding January 1, 1879, and after redemption again paid out.

If, under the Act of May 31, 1878, there is paid out of the Treasury to-day a note for $1,000 as the equivalent of ten $100 notes outstanding January 1, 1879, presented for re-

demption and actually redeemed and paid off in coin, where is the law by which the Secretary of the Treasury is compelled to pay the newly issued note for $1,000, in coin, if he chooses to pay it in greenbacks?

If any such law exists, Congress can repeal it at pleasure.

If Congress has the power to create and maintain a legal tender currency by the use of paid-off obligations in time of peace, and without any justifying public exigency, it has like power to regulate the amount and to increase it indefinitely. Convertibility into coin, if it rests on the will of Congress, can be prohibited as easily as cancellation after redemption in coin was prohibited. In other words, the currency is "money" as the equivalent of coin, only so long as Congress chooses to have it so, and it is "money," as the equivalent of paper, whenever Congress shall so elect.

The permanent efficiency of the notes to answer the purpose of "money" depends upon their convertibility into coin at the will of the holder. This is an axiom in any sound system of finance.

No Government can maintain a note circulation based exclusively on its own credit at par with gold, except by redeeming it in gold at the will of the holder. To do this requires a permanent and sufficient reserve of gold, or the power in some way to control the volume of circulation, which, unless the Government assumes the functions of banking, and so adjusts its issues as to regulate them according to the commercial needs of the country, cannot be accomplished.

If, then, by the Act of May 31, 1878, it was intended to perpetuate the legal tender quality, the convertibility of the notes into coin necessarily depends upon the will of Congress, and by whatever name it may be called, the power to maintain a permanent paper currency as money, convertible into coin only so long as Congress shall see fit, is a continuous forced loan, without warrant of public need or of sound principle, unsustained in this country by precedent and unsupported by authority.

## IV.

It must, therefore, be concluded that Congress did not intend by the Act of May 31, 1878, to give to the new issue of the paid-off United States notes which it required, the legal tender element. Doubtless, many of the legislators who voted for the act desired to keep the legal tender currency in circulation. Their views found support in those of the Secretary of the Treasury (*ante*, *p.* 38). But whatever may have been the preferences of individual representatives in Congress or of the Treasury Department, this court will give as full effect to the provisions of the Resumption Act as to those of any other statute. It stands unrepealed, and all earlier or later legislation relating to United States notes must be viewed in connection with its provisions. Nor will this court give a construction to either statute which shall destroy or interfere with the other, if both can be so construed as to stand together.

As already shown, the Resumption Act necessarily superseded sections 3579 and 3588 of the Revised Statutes as as they stood on January 1, 1874 (*ante*, *pp.* 34, 35). But when, pursuant to Act of March 2, 1877, a new edition of the Revised Statutes was prepared and published (February 18, 1878), the provisions of the Resumption Act were not incorporated into the text of the new edition because it was not by its terms an Act "amendatory of the Revised Statutes," but as required by the statute directing the new edition, a marginal reference to the Resumption Act, was made against section 3579 as an act affecting or modifying the provisions of that section.

The Act of May 31, 1878, by its terms substituted in lieu of section 3579, which authorized a reissue of the notes after their *return* to the Treasury, "as the exigencies of the "public interest might require," an express mandate that they should, after *redemption*, be again issued, paid out and kept in circulation, irrespective of any public exigency. It did not revive or re-enact section 3588, which alone made the notes lawful money and a legal tender, and which, as well as section 3579, had been superseded by the provis-

ions of the Resumption Act, as to all notes which should be presented for redemption, and should be actually redeemed.

The Act of May 31, 1878, did not attempt a repeal of the Resumption Act. The two statutes can be reconciled so as to give full force and effect to both, by the view that the new use of the notes after payment and redemption, whether as evidences of debt or as currency, was subject to the operation of the Resumption Act in its integrity and to its full intent. The result would be that by the redemption of the notes, the old war debt was extinguished and the war incident of legal tender abolished, leaving the notes as discharged obligations in the hands of the Secretary of the Treasury, to be used, as directed by the Act of 1878, as a medium of circulation, stripped of the legal tender incident, which having come into being in the crisis of the war and having been upheld solely as a necessary part of the debt incurred for its prosecution, cannot survive the redemption and extinguishment of the debt itself.

## V.

The act of May 31, 1878, may well be construed as authorizing a circulation of United States notes, without the quality of legal tender, because this quality is not essential or necessary to the notes as a circulating medium.

The power to issue notes in the form of the present "greenback" is unquestioned. Like bank notes, they are "bills of credit." While the Federal Convention struck out from the clause in the draft of the Constitution as reported, giving Congress the power "to borrow money and *emit bills on the credit of the United States*," the power to emit bills, the debate clearly shows that the thing aimed at was not the issuing of bills, but their issue as a legal tender.

*Madison Papers, vol.* 3, *p.* 1343–1346, *and note to p.* 1346.

"With the full recollection of the need, or seeming need, "of paper money in the Revolution, with the menace of "danger in future time of war from its prohibition, author-

" ity to issue bills of credit that should be legal tender was " refused to the General Government by the vote of nine " States against New Jersey and Maryland. It was Madi- " son who decided the vote of Virginia; and he has left his " testimony that 'the pretext for a paper currency, and par- " ticularly for making the bills a tender, either for " public or private debts, was cut off.' This is the inter- " pretation of the clause, made at the time of its adoption, " alike by its authors and its opponents, accepted by all the " statesmen of that age; not open to dispute, because too " clear for argument, and never disputed so long as any one " man who took part in framing the Constitution remained " alive."

*Bancroft's Hist. of the Const., vol. 2, p.* 134.

In *Craig* v. *State of Missouri*, 4 Peters, 410, this court held, that the words "to emit bills of credit" described "paper " intended to circulate through the community for its or- " dinary purposes as money," and that the Constitution " considers the emission of bills of credit and the enactment " of tender laws as distinct operations, independent of each " other, which may be separately performed." Chief Justice MARSHALL adds, "we do not think that the " history of our country proves either that being made " a tender for the payment of debts is *an essential quality* " *of bills of credit*, or the only mischief resulting from " them" (*p.* 434).

In *Briscoe* v. *Bank of Kentucky*, 11 Pet., 257, this court define bills of credit as "paper issued by the sovereign " power containing a pledge of its faith, and designed to " circulate as money" (*p.* 314).

Judge STORY says, in his opinion, dissenting, but not on this point, "they are not in a legal and exact sense, money, " but for common purposes, they possess the attributes, " and perform the functions of money" (*p.* 330); and he adds, " the history of our country proves that it is not of " the essence of bills of credit, it is not a part of their defini- " tion, that they should be a tender in payment of debts" (*p.* 333). * * * We find that many of "them never were " a tender. Nay, that the enormous issues by the revolu-

" tionary Congress were altogether stripped of this quality " (*p.* 338).

*And see Darrington* v. *State Bank of Alabama*, 13 How., 12.

As stated by Judge STORY, the bills of credit of many of the States prior to the Constitution, circulated as money without the quality of legal tender, and this was true of the notes issued during the war of 1812–1815.

*Opinion of Mr.* Justice FIELD, 12 Wall., *p.* 636.

In the case already cited of *Bank* v. *Supervisors*, 7 Wall., 26, (*ante*, *p.* 13, *p.* 48), it was held, as to the legal tender notes, that, " apart from the quality of legal tender im- " pressed upon them, * * * their circulation as curren- " cy depends on the extent to which they are received in pay- " ment, on the quantity in circulation, and *on the credit given* " *to the promise which they bear. In these respects, they resemble* " *the bank notes formerly issued as currency.*"

If the Acts of 1862 and 1863 had been silent as to the legal tender quality, there is no reason why the United States notes should not have circulated as money, as did the Bank of England notes during the entire period of the operation of the "Restriction Act," under which specie payments by the bank were suspended in 1797. Intended, like our legal tender acts as a "temporary measure," and induced by the fear of impending invasion, the Act continued in force until May 1, 1823. The expectation of a speedy return to specie payments was illusory, and the sole circulating medium was the Bank of England note, although not a legal tender.

As shown by Mr. Justice BRADLEY, in his opinion in the *Legal Tender Cases*, *p.* 568, the legal tender quality of the notes was maintained, perforce, by the whole nation, the universality of the rule of popular acquiescence being demonstrated by a single unpatriotic exception (*Id.*, *p.* 569).

Bank of England notes are now a legal tender only so long as the bank redeems them in coin, and not at all as to payments by the bank.

*See the text of the statute, Appendix, post, p.* 79.

As the circulation of the bank, through its "Issue Department," is limited to £15,000,000, based on government debt and securities, with a requirement that all notes issued in excess of such limit must be represented by an equivalent in coin held by the bank, the notes of the Bank of England are rendered really equivalent to gold. "The currency "rests on the principle that all debts, above forty shillings, "shall be paid in gold, but individuals and associations, in- "cluding the banking commercial department of the bank, "have the option, if they prefer it, to exchange gold for bank "notes, and to make use of the latter in their dealings with "the public."

*Ency. Brit., 9th Ed.*, 1878, *Article*, "*Banking.*"

In *Veazie Bank* v. *Fenno*, 8 Wall., 533 (*ante. p.* 19), the court say:

"The currency now consists of coin, of United States "notes, and of the notes of the National Banks. Both de- "scriptions of notes may be properly described as bills of "credit, for both are furnished by the Government; both "are issued on the credit of the Government, and the Gov- "ernment is reponsible for the redemption of both; primi- "arily as to the first description, and immediately upon de- "fault of the bank, as to the second" (*p.* 549).

These remarks are stated to be without reference to the question of the legal tender quality (*p.* 548).

But the United States note currency cannot be said to be convertible into coin at the will of the holder so long as the continuance of convertibility depends on the will of Congress, and the legal tender quality can, by the same will, be foisted upon it with all the incidents of a forced loan, except its necessity.

Nor does the Treasury Department now urge the legal tender quality as an essential or even as a requisite.

The Secretary of the Treasury, in his report, dated December 31, 1881, says of the "*Legal Tender Notes*:"

"That they are convenient and safe for the community is "without doubt. That it is for the profit of the Govern- "ment to continue them is also without doubt. Yet there "is one consideration that should have notice, and that is

"whether the Government can continue to claim for them "the quality of being a legal tender for debts. This depart- "ment understands that the constitutionality of making "them a solvent for contracts was found in the exigencies "of the Government raised by the civil war. Whether, "now that that war has some time since ceased, and the Gov- "ernment has resumed payment of the debts in gold and "silver coin, notes of the United States shall be maintained "as currency with the legal tender quality, is a question "worthy of attention" (*Annual Report of the Secretary of the Treasury for year* 1881.)

## FOURTH POINT.

**If the Act of May 31, 1878, was intended to direct the keeping in circulation of the United States notes therein described with the legal tender quality, it was, to that extent, *unconstitutional and void*, and should be so declared by this court.**

To emit bills of credit as currency, and with the quality of legal tender, in time of peace, and in the absence of any apparent public exigency, is not within any of the express powers delegated to Congress by the Constitution, nor is it within any of the powers which can properly be implied or which necessarily result from those which are expressly granted.

The attempt to keep in circulation, with the legal tender quality, and as money, United States notes issued and re-issued under the Acts of 1862 and 1863, and the provisions of the Revised Statutes, notwithstanding the later express requirement of the Resumption Act, that such notes should be REDEEMED IN COIN, and after their actual redemption, was not a means appropriate to any legitimate end of the Government of the United States, and was therefore beyond the power of Congress.

These propositions, if not RES ADJUDICATA, are just and necessary inferences from the decisions of this court.

I.

It is not proposed to renew in this brief the general argument against the power of Congress ever, or under any circumstances, to make United States notes a legal tender.

The historical review already presented sufficiently exhibits the course of action by which, under the stress of an unprecedented and unforeseen emergency, and as a temporary expedient, this pernicious power, against which the framers of the Constitution supposed they had been able to "shut and bar the door" (*Ellsworth; Madison Papers, p.* 1345), so as "to cut off the pretext for a paper currency, "and, particularly, for making the bills a tender, either for "public or private debts" (*Madison, Id., p.* 1346, *note*), was resorted to by the legislative and upheld by the judicial department of the Government.

The opinions of the majority of the court, as reported in *Hepburn* vs. *Griswold*, 8 Wall., 603, and of the minority, as reported in the *Legal Tender Cases*, 12 Wall., 457, are full, although not now authoritative expositions of the views of those who deny the existence of the power.

With a single honored exception, all the voices raised in opposition to the power, both on the bench and at the bar, whose utterances are recorded in the cases referred to, have been silenced by death. Accepting, as final, the result by which the view for which they contended was also silenced, we place the present argument upon a ground which that result fully supports and necessarily implies, to wit, that the Constitution vests no power in Congress, either by express grant or as the result of any one or of all the powers which it confers, to create, at will and in the absence of any national exigency, a legal tender paper currency, to exist for an indefinite period, and to be an enforced substitute for coin in the payment of public and private debts.

II.

THE FACT OF PUBLIC EXIGENCY THE SOLE BASIS OF THE POWER OF CONGRESS TO PASS LEGAL TENDER LAWS.

The court said, in *The Legal Tender Cases*, 12 Wall., 457, p. 539:

"Before we can hold the legal tender acts unconstitu-
" tional, we must be convinced they were not appropriate
" means, or means conducive to the execution of any or all
" of the powers of Congress, or of the Government, not
" appropriate in any degree (for we are not judges of the
" degree of appropriateness), or we must hold that they
" were prohibited. This brings us to the inquiry whether
" they were, when enacted, appropriate instrumentali-
" ties for carrying into effect or executing any of the known
" powers of Congress, or of any department of the Govern-
" ment. Plainly, to this inquiry a consideration of the time
" when they were enacted, and of the circumstances in
" which the Government then stood, is important. It is
" not to be denied that acts may be adapted to the exer-
" cise of lawful power, and appropriate to it, in seasons of
" EXIGENCY, which would be inappropriate at other times."

And the court held that the exigency warranted the conclusion that the power existed.

In precise conformity with the view announced in the above citation has been the uniform current of decision in this court. The question of the constitutionality of an Act of Congress, or of a State Legislature, as well as the question of its construction, must be considered in the light of the history of the time when it was enacted.

The question here is not simply as to the exercise of a power conceded to exist, but as to the existence of the power itself at the time of its attempted exercise.

And whenever the power sought to be exercised depends, or must be predicated, upon a given state of facts, the existence of the power is a JUDICIAL QUESTION to be determined upon the facts.

Where jurisdiction depends upon locality, as in the Admiralty Courts; or upon citizenship, as in controversies between citizens of different States; or upon time, as in the case of *ex post facto* legislation; or upon the condition of public affairs, as in the case of the suspension of the privilege of the writ of *habeas corpus*, which can only be "when in cases of rebellion or invasion the public safety "may require it," the constitutional power of Congress rests upon the facts necessary to its existence, and these facts must appear and be established as the basis of the power and the warrant for its exercise.

This has been the settled rule as applied by this court. In *Marbury* vs. *Madison*, 1 Cr., 137, where the 13th section of the Judiciary Act, conferring on this court the power to issue writs of mandamus in cases of original jurisdiction, was declared unconstitutional, Chief Justice MARSHALL thus illustrates the proposition:

"'No person,' says the Constitution, 'shall be convicted "of treason, unless on the testimony of two witnesses to the "same overt act, or in confession in open court.' Here the "language of the Constitution is addressed especially to the "courts. It presented directly for them a *rule of evidence* "not to be departed from. If the Legislature should change "that rule, and declare one witness, or a confession out of "court, sufficient for conviction, must the constitutional "principle yield to the legislative act?"

A striking instance of this dependence of a power of Congress upon facts and circumstances to be judicially determined, is found in the history of the constitutional grant of admiralty jurisdiction. The Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," without defining the limits of that jurisdiction. It gave to Congress the power of ordaining and establishing courts inferior to the Supreme Court, and by the Judiciary Act of September 24, 1789, it established the District Courts, and conferred upon them exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction.

Under this power, thus granted by the Constitution,

the jurisdiction of the District Court was invoked in reference to a transaction occurring upon a navigable river where the tide did not ebb and flow, and this court held, in view of the fact of locality appearing on the record, that the grant of power in the Constitution did not extend to such cases, but must be confined, as in England, to tide waters. On this basis of fact, the existence of the power of Congress to confer the jurisdiction as to inland waters was denied. Such was the decision of this court in *The Thomas Jefferson*, 10 Wheat., 428, in 1825, and as said by Mr. Justice CLIFFORD, in *The Belfast*, 7 Wall., 624, the rule so established "was followed for more than a quarter of a century" (*p.* 637).

Accordingly, in 1848, in a case of collision on the Mississippi river, near the Bayou Goulat, the claim of jurisdiction in the District Court, under the grant of power in the Constitution, involved the question of fact "whether the tide "flowed so high. There was a good deal of conflicting "evidence. But the majority of the court thought there was "sufficient proof of tide there, and consequently it was not "necessary to consider whether the admiralty power ex-"tended higher."

*Waring* v. *Clarke*, 5 How., 441, *and comments of Chief Justice* TANEY, IN 12 How., *p.* 456.

Notwithstanding the limitation put upon its powers by the decision in the *Thomas Jefferson*, and later in the *Steamboat Orleans* v. *Phœbus*, 11 Pet., 175, Congress, in 1845, passed an act extending the jurisdiction of the United States District Courts to certain cases upon the lakes and navigable waters connecting the same.

The conviction that the limitation of the power of Congress, to confer jurisdiction in cases of admiralty was narrower than the Constitution contemplated, had as Chief Justice TANEY says, (12 How., *p.* 451), "been growing "stronger every day with the growing commerce on the "lakes and navigable rivers of the Western States."

Congress gave expression to this conviction by the Act of 1845 (5 *Stats. at Large*, 726).

The question of its constitutionality came before this court in the *Genesee Chief*, 12 How., 443, and in the light of

what may not improperly be called the newly discovered evidence which the wonderful development during the second quarter of the present century of our commerce on its great natural highways forced upon the view of the judiciary as well as the legislature, this court abandoned its former views, and held that the power of Congress, as granted by the Constitution, was not measured by tide water, as held in the case of *The Thomas Jefferson*, a "decision made in 1825, when the commerce on the rivers of "the West and on the lakes was in its infancy, and of little "importance, and but little regarded compared with "that of the present day." And thus the constitutional grant of admiralty jurisdiction has been held to be commensurate with the public needs, as demonstrated by the existing facts and circumstances applicable to the subject.

*See also*, *The Belfast*, 7 Wall., 624.
*The Magnolia*, 20 How., 296.
*Ins. Co.* v. *Dunham*, 11 Wall., 1.
*The Lottawanna*, 20 Wall., 201.

In the *Slaughter House case*, 16 Wall., 36, involving the construction of the Thirteenth and Fourteenth Amendments of the Constitution of the United States, and presenting questions in respect to which the court said that none "so "important in their bearing upon the relations of the "United States, and of the several States to each other, and "to the citizens of the State and of the United States, have "been before the court during the official life of any of its "present members," the judicial inquiry proceeded mainly upon the basis of the history of the times connected with the passage of the amendments, a history characterized as being "fresh within the memory of us all, and its leading "features, as they bear upon the matter before us, free from "doubt" (*p.* 68).

In the *Granger cases*, 94 U. S., 113, the court said, in reference to the State legislation involved:

"For our purposes we must assume that if a state of facts "could exist that would justify such legislation, it actually

"did exist when the statute now under consideration was "passed. For us the question is one of power, not of ex- "pediency. If no state of circumstances could exist to "justify such a statute, then we may declare this one void, "because in excess of the legislative power of the State."

Without multiplying citations, a general reference may suffice to the numerous cases in which the constitutionality of Acts of Congress passed during the civil war, and the validity of proceedings taken under them, have been considered and decided by this court in view of the facts on which they were based.

*The Confiscation Cases—Miller* v. *U. S.*, 11 Wall., 268.
*Tyler* v. *Defrees*, *Idem*, 331.
*Civil Rights Cases—Strauder* v. *West Virginia*, 100 U. S., 303.
*West Virginia* v. *Rives*, *Idem*, 313.
*Ex parte Virginia*, *Id.*, 339.
*Neal* v. *Delaware*, 103 U. S., 370.

The exercise of jurisdiction by a court or a Legislature, assumes the existence of the jurisdiction in the tribunal or body exercising it. When the jurisdiction actually exists, its exercise cannot be attacked collaterally; but where it is dependent on a given state of facts, and these do not exist, the judgment or the statute is absolutely void, and may be assailed collaterally.

The principle that the public exigency is the sole foundation of the power exercised in time of war for the public safety and welfare is recognized and stated in *Mitchell* v. *Harmony*, 13 How., 420, where a military officer had impressed private property into the public service.

The court held, that this power can exist only where the exigency requires it, and where the "civil authority would "be too late in providing the means which the occasion "calls for," and they say: "*It is the* EMERGENCY *that gives* "*the* RIGHT, *and the emergency must be shown to exist before the* "*taking can be justified.*" It was accordingly held, to justify the taking the military commander must show affirmatively

in an action of trespass "the nature and the character of the "emergency, such as he had reasonable grounds to believe "it to be," and failing to show an emergency justifying the act, he was held liable.

In *Beard* v. *Burts*, 95 U. S., 434, the plaintiff below brought his action against the defendant for entering on his land and cutting wood. The defendant pleaded that he cut the wood as an authorized agent of the United States Government, and for military purposes. This was upheld as a sufficient plea under the Acts of Congress of March 3, 1863, and May 11, 1866, protecting from civil suits all persons acting under the military authority during the rebellion (12 *Stat.*, 756; 14 *Id.*, 46), as therein provided, it appearing that "the "wood was cut for the military railroads, under military "authority, *before military operations in suppression of the re-* "*bellion had ceased*" (*p.* 438).

If Congress, in 1878, had passed an act extending a like protection as that given by the Acts of 1863 and 1866 to trespassers in time of peace, its unconstitutionality would have been as apparent on its face as if it had further provided for quartering troops in a house without the owner's consent in time of peace, or without prescription of law in time of war (*Amendments to Constitution, Arts.* III., V).

And in *ex parte Milligan*, 4 Wall., 2 the court say, in reference to the same subject, and in almost identical language: "Where war really prevails there is a necessity "to furnish a substitute for the civil authority. * * As "necessity creates the rule, so it limits the duration; for if "this" [military] "government is continued *after* the "courts are reinstated it is a gross usurpation of power" (*p.* 127).

## III.

IN THE ABSENCE OF PUBLIC EXIGENCY, LEGAL TENDER LEGISLATION NOT A MEANS APPROPRIATE TO ANY LEGITIMATE END OF GOVERNMENT.

Whenever the question of the constitutionality of an act of Congress has turned upon the question whether it is to be upheld as a means appropriate to an end, the same principle has been applied, and the existence of the power, independently of the question of its degree or of the extent to which is should be exerted, has been made to depend upon the basis of the established and admitted facts and circumstances constituting the occasion of its exercise.

While, as to all express and enumerated powers vested in Congress by the Constitution, it has been often held that it is the province of Congress to judge as to the extent to which they are to be exercised (*Wheeling-Bridge Case*, 18 How., 421; *The Clinton Bridge*, 10 Wall., 454; *South Carolina* vs. *Georgia*, 93 U. S., 4, *p.* 12; *Gilman* vs. *Philadelphia*, 3 Wall., 713), the rule is otherwise where the power is not given by express terms, but is claimed to be implied as a necessary or proper means to some legitimate end within the scope of the Constitution. The question whether the end is legitimate and within the purview of the Constitution, and whether the means are appropriate and not prohibited by but consistent with the letter and spirit of the Constitution, is a JUDICIAL question, to be determined by this court, and has been so determined whenever occasion required, from the case of *Marbury* vs. *Madison* (Feb., 1783), 1 Cr., 137, to the present day.

This is necessarily involved in the often quoted and universally accepted dictum of Chief Justice MARSHALL, in *McCulloch* vs. *State of Maryland*, 4 Wheat., 316, p. 421:

"Let the end be legitimate—let it be within the scope of "the Constitution—and all means which are appropriate, "which are plainly adapted to that end, which are not pro- "hibited, but consist with the letter and the spirit of the "Constitution, are constitutional."

On the basis of the proposition thus formulated this court, in the case last cited, involving the question of the power of Congress to incorporate a bank, proceeded to enquire and to decide, in the particular case before it, whether in fact a bank was an appropriate means adapted to a legitimate end of the Government, and not prohibited by the Constitution.

The discussion involved questions of fact, of political economy and policy, as well as the interpretation and construction of the Constitution. Mr. WEBSTER argued in support of the power, that the constitutional grant of authority to pass all laws necessary and proper to carry into execution the powers expressly conferred on Congress, meant such powers as were "suitable" and "fitted" to the end proposed, and that in fact a bank was a proper and suitable instrument to assist the operations of the Government in collecting and disbursing the revenue, the occasional anticipation of taxes and imports, and in the regulation of the actual currency as being a part of the trade and exchange between the States (4 Wheat., *p.* 324). These were undoubtedly legitimate ends of Government, and the bank being an appropriate means to such an end, it was not for the court, but for Congress, to decide whether a bank was the best means.

In the present case the question turns chiefly upon the same point. If the creation in any way, and by any means, of a permanent legal tender paper currency as a practical substitute for coin, is a legitimate end of our constitutional Government in its ordinary administration, irrespective of any existing and pressing exigency, then the action of Congress in directing the printing and issuing of Treasury notes and in providing by general terms that they shall be lawful money, and a legal tender in payment of debts, public and private, and that they shall never be retired or canceled, but as fast as they return into the Treasury shall be again paid out and kept in circulation, are appropriate means to such an end, and it needs only for Congress to remove the existing limit of the issue and increase the amount, in order to flood the country with a volume of paper, utterly destructive of any other debt paying medium.

But if, on the contrary, such was not the intent of the Constitution, and the power to make bills of credit a legal tender is only to be implied in the presence of some existing and apparent necessity, then the fact of the existence of such necessity as the basis of the existence of the power is a question for judicial determination. Congress being clothed only with delegated powers, and the power in question not being expressly delegated, but derived from the general scope of those expressly delegated, and to be used as a means to an end, the inquiry whether the end sought to be attained is a legitimate one, must properly be pursued in the judicial department of the Government. Otherwise the assertion and exercise by Congress of any implied power, irrespective of facts or circumstances, would destroy all limitations, and give to the implied powers a greater force than the express powers themselves.

The most forcible illustration of the principle that in determining the question of the constitutionality of an Act of Congress resting on an implied power, the basis of fact may become the central and sole support of the statute law, as an appropriate means to a necessary end, is found in the course of adjudication on the legal tender legislation itself.

No one doubts that if the first decision in 1869 had not been overruled by the later decision in 1870, it would have stood as the law, just as the decision in the *Thomas Jefferson* stood during the period it remained in force. The change of view, not of the members of the court, but of the court, as a department of the Government, on the unchanged facts, worked the result, and as the necessities of commerce, as shown in its history, compelled the overruling of the *Thomas Jefferson*, so it was in the retrospect of the rebellion, that the Constitution, read in its lurid light, was found to sanction the legal tender expedient as a WAR MEASURE.

It is not necessary to claim that the power upheld in reference to the Acts of 1862 and 1863 is exclusively a WAR POWER. The definition would probably be sufficiently accurate, although not necessarily complete. It is safe, however, to call it, as sanctioned by this court, an *extraordinary power*. And it is safe to say that it can be attributed to Congress only, when shown to be a means appropriate to a legitimate end

of the Government. As such a means adapted to secure the most important ends, including the preservation of the imperilled union of the States, this court upheld it, in view of the extraordinary circumstances under which it was exerted (*ante*, *p.* 26). However derived, or however defined, the power itself was exhausted when the occasion which evoked it ceased. The forced loans of 1862 and 1863, in the form of legal tender notes, were vital forces in the struggle for the national supremacy. They formed a part of the public debt of the United States, the validity of which is solemnly established by the Fourteenth Amendment to the Constitution. Their legal tender quality and their character of currency were due solely to the war. To the war was due, not only the exercise of the power to give this quality and character, but the power itself.

The Resumption Act directed the forced loans authorized by the Acts of 1862 and 1863, and continued by the Revised Statutes of 1874, to be redeemed and paid on demand on and after January 1, 1879.

The Resumption Act also fixed the limit of time beyond which the currency which evidenced the loans should not be irredeemable. After January 1, 1879, it was redeemable in coin, and this quality of redeemability thenceforth inhered in every United States note described in the Resumption Act. It was not taken away by the Act of May 31, 1878, and could not be taken away, because the promise to pay the sum expressed in the Treasury notes had been made by the Resumption Act a promise to pay in coin. Nothing short of a repeal of the Resumption Act, and a repudiation of the obligation which it created, could change the character of the promise. After the Resumption Act was approved, every note outstanding was as much a promise to pay in coin, on demand, on and after January 1, 1879, the sum specified, as if those words had been printed on its face.

Instead of repealing the Resumption Act, Congress attempted to deal with the United States notes after redemption, and to direct them to be issued, paid out and kept in circulation as currency. But this required either the revival of the power already spent and exhausted, or else the exer-

cise of some one of the normal powers of Congress under the Constitution. The *post redemption* circulation with the legal tender quality, could be accomplished in only one of two ways, either by continuing, in time of peace, the exceptional war measures of the Rebellion, or by asserting the power, as one properly to be exercised at any time, according to the will and pleasure of Congress.

The power claimed and put forth in the Act of May 31, 1878, if intended to perpetuate a legal tender currency, is simply the power to turn the Treasury of the United States into a bank, with the function of issuing circulation as Congress may dictate, redeemable or irredeemable, as Congress may prescribe, with nothing permanent in the system or its administration, save the enforced debt-paying power of the currency emitted, as a standing substitute for coin.

The END proposed is the establishment and maintenance of a permanent currency, based on the credit of the Govern, ment. The MEANS to the end is the issue of Treasury notes, convertible into coin, during the pleasure of Congress, but, practically, irredeemable, because always to be kept in circulation as a legal tender. If this is an appropriate means to a legitimate end, we must unlearn all the lessons of the past, reverse the rules of sound economy, and seal up the volumes which contain the judicial interpretation of the Constitution.

What we claim is, that by virtue of the Resumption Act, all the outstanding "legal tender" notes are promises to pay the sum specified therein in coin; that they may circulate as "money" on the credit of the Government, and thus, in all transactions be a legal tender by common consent, in all parts of the country, but must always be convertible into coin on demand, at the will and pleasure of the holder, and not at the will and pleasure of Congress,

If this view shall be sustained, it will apply to the operations of the Treasury Department the sound rule existing before the war, and it will not deprive Congress of the power of resorting in time of public exigency to any expedient necessary for the maintenance of the Government.

It has never been possible to divorce the question of the

constitutional power to coin the public credit into money, and make it an instrument of discharging debts, from the history of legal tender paper money and its consequences. Nor is it possible now,

Facts have nowhere shown themselves to be more stubborn than in this discussion. The strange anomaly is presented, that while the mischiefs of the existing legal tender currency are established beyond contradiction by the voice of history, the teachings of experience, the recorded testimony of its authors, and the repeated decisions of this court, we now find it domesticated among us as an integral part of our National economy, under legislation which, unless arrested by this court, will warrant its perpetual continuance as a part of the ordinary administration of the Government.

## V.

IT IS MATTER OF UNDISPUTED FACT THAT, AS TO THE LEGAL TENDER QUALITY, NO PUBLIC EXIGENCY REQUIRED OR JUSTIFIED THE PASSAGE OF THE ACT OF MAY 21, 1878.

*See ante, pages* 40, 41.

## VI.

IT IS EQUALLY PLAIN THAT, AS TO THE LEGAL TENDER QUALITY, IN THE ABSENCE OF A PUBLIC EXIGENCY, NO AID IS DERIVED TO THE ACT OF MAY 31, 1878, FROM ANY OF THE POWERS GRANTED BY THE CONSTITUTION TO CONGRESS.

**1**. It cannot be claimed, as to the legal tender quality, that the prohibition to retire the United States notes when redeemed, and the direction to issue them after redemption, irrespective of any need of the Government, was a legitimate exercise of the power "to borrow money." The use of the legal tender element was wholly unnecessary as a means of borrowing, as already shown (*ante, p.* 40), and, in fact, the

whole public debt was provided for by the funding measures, and the Resumption Act had explicitly directed that portion of it which was represented by the legal tender notes to be redeemed in coin. The legal tender quality was, therefore, not required as an incident or aid of the borrowing power. The credit of the Government was a sufficient guaranty for the debt.

The terms of the act are wholly inconsistent with its interpretation as an exercise of the borrowing power, but if it is to be interpreted as authorizing the Treasury Department to borrow an amount equivalent to the redeemed notes, then such new loan was a peace measure and not a war measure, and the legal tender quality must be eliminated as not available or within the power of Congress, in the absence of any pretext of a justifying exigency.

Nor can the issue of currency attempted by the act be brought within the power "to coin money and regulate the value thereof." Whatever may have been claimed under this provision as to the original issue, it can have no application here. The promise of the outstanding unredeemed legal tender notes on May 31, 1878, as enlarged by the Resumption Act, had become a promise to pay on demand, in coin, the sum specified by the notes respectively, and this obligation was not interfered with by the act in question. But this court expressly declared in the *Legal Tender Cases*, 1 Wall., 457, p. 547, in reference to the coining power, "we "do not, however, rest our assertion of the power of Con- "gress to enact Legal Tender Laws upon this grant," and in the concurring opinion of Mr. Justice BRADLEY, it is said:

"This power is entirely distinct from that of coining "money and regulating the value thereof. * * * It "is not an attempt to coin money out of a valueless material. " * * * It is a pledge of the national credit. "It is a promise by the Government to pay dollars; it is not "an attempt to make dollars. The standard of value is not "changed. The Government simply demands that its credit "shall be accepted and received by public and private cred- "itors during the pending exigency."

It is, therefore, not necessary to discuss the question whether the grant of power in the Constitution to coin money, gives to Congress the right to substitute paper money for coin as a legal tender. The argument is exhausted in the *Legal Tender Cases*, as reported.

**3**. The Act of May 31, 1878, is, of course, unsupported by any of the powers given to Congress to "declare war," or to "raise and support armies" and "a navy," nor can public emergency of any kind be pleaded as an excuse for its enactment. The plea of the Secretary of the Treasury (*ante*, *p.* 39), that the continuance of the legal tender would be a safeguard against *future emergencies*, was an admission that no present emergency existed which required its continuance or creation.

**4**. The claim for the exercise of the power attempted by the Act of May 31, 1878, on the ground that it was intended to supply a currency for the people, simply revives the question whether making the "legal tender" and "lawful money" qualities an attribute of such a currency is within the scope of the powers of Congress. If we are right in claiming that these qualities are wholly independent of the proper elements of United States notes, when issued under ordinary conditions (*ante*, *p.* 52), then the power to issue such notes does not imply or carry with it the power to connect these qualities with the notes, save in the exigency which creates the power.

The scheme of the Act of May 31, 1878, appears to be that the Government shall issue, in its own notes, a paper currency for use among the people, declaring it lawful money and a legal tender at all times; determining its volume, with the power to increase it at will, and to make it available for all debt paying purposes, public and private.

Such a legal tender currency, kept indefinitely in circulation, and being lawful money, would be convertible into coin only so long as Congress should see fit to permit the Secretary of the Treasury to pay out coin in exchange for the notes, and if there is no Constitutional impediment, the return to payments in paper could be effected by a simple

cessation of payments in gold. If the notes continue to be lawful money, any one of them is equally good now as before January 1, 1879, for the payment of any other note of the same denomination, and what is called "resumption in coin" has no permanent significance or stability.

If it is within the province or the power of Congress to provide a national currency, this has been done by the creation and maintenance of the national banking system, in respect to which the latest official utterance, from the source best qualified to convey information on the subject, is as follows:

"The security of the national bank note under the pres-
"ent system is perfect. In twenty years not a single bank
"note has failed to be redeemed at its face value." (*Report of Comptroller of the Currency*, Dec. 4, 1882.)

These notes are not legal tender, but they are practically "money" as "greenbacks" are, and so would the latter be if, with the legal tender quality omitted they are kept within proper limits, and remain in circulation, not as money, but as the representatives of money.

Without going at length into a discussion which belongs elsewhere, it may safely be asserted that the best, if not the unanimous, judgment of all political economists, the world over, is, that a well regulated system of currency issued by local banks, in a volume proportioned to their capital, redeemable on demand in coin, and secured by a deposit with the Government of securities ample and adequate as the basis of the circulation, is better than any possible system of Government circulation.

## VII.

The question for this court is, however, one of the existence of the power in Congress, not as to the method of its exercise when it actually exists. The power to issue United States notes, and their use and utility as a part of the circulating medium, are not questioned. The power to add the quality of legal tender in case of a public exigency so great as to set aside the ordinary course of the administration of the Government, and to require a resort to extra-

ordinary means for the public welfare, has been upheld by this court upon the facts appearing in the particular cases before it. But as the exigency created the power, so it limited the duration of the power. To attempt its exercise long after the exigency had ended, after the war which called it into being had ceased to exist, save in history and recollection, and after all the extraordinary and exigent methods of government, civil and military, which marked its dark and blood-stained days had been succeeded by the calm and order of established peace, is, we humbly submit, in excess of any power reposed by the Constitution in Congress.

As the Constitution was framed; as it stands; as it has been construed; it grants no such power. We venture to affirm that if ever engrafted on the organic law, it must be by way of amendment, through the suffrages of the Nation, and not by a concession extorted from its Supreme Court.

## FIFTH POINT.

**The judgment of the United States Circuit Court should be reversed and the cause remanded, with directions to enter judgment for the plaintiff on the demurrer.**

BUTLER, STILLMAN & HUBBARD,
*Attorneys for Plaintiff in Error.*

GEORGE F. EDMUNDS,
WILLIAM ALLEN BUTLER,
*Of Counsel.*

# APPENDIX.

## Table of Issues and Redemptions of United States Notes.

*From Report of Treasurer of United States, November 1, 1882.*

| Denomination. | 1880. | | 1881. | | 1882. | |
|---|---|---|---|---|---|---|
| | Issued. | Redeemed. | Issued. | Redeemed. | Issued. | Redeemed. |
| One Dollar | $9,057,863 00 | $6,935,511 80 | $9,889,034 00 | $7,575,604 40 | $11,445,524 00 | $8,370,332 00 |
| Two dollars | 8,232,000 00 | 5,971,840 20 | 8,752,000 00 | 6,860,690 60 | 10,472,000 00 | 8,093,497 00 |
| Five dollars | 19,680,000 00 | 8,354,565 00 | 14,760,000 00 | 10,623,470 00 | 14,280,000 00 | 16,506,538 00 |
| Ten dollars | 16,520,000 00 | 6,241,811 00 | 9,160,000 00 | 7,086,364 00 | 6,680,000 00 | 10,885,621 00 |
| Twenty dollars | 17,360,000 00 | 5,687,680 00 | 6,240,000 00 | 6,111,610 00 | 5,680,000 00 | 9,294,126 00 |
| Fifty dollars | 1,400,000 00 | 2,114,345 00 | 1,200,000 00 | 2,306,085 00 | 3,200,000 00 | 2,711,140 00 |
| One hundred dollars | 3,052,700 00 | 2,293,310 00 | 2,944,300 00 | 2,794,510 00 | 4,527,900 00 | 3,006,170 00 |
| Five hundred dollars | 2,300,000 00 | 15,645,500 00 | 700,000 00 | 5,354,000 00 | 1,750,000 00 | 1,444,000 00 |
| One thousand dollars | 700,000 00 | 19,238,000 00 | 900,000 00 | 5,408,000 00 | 1,500,000 00 | 1,189,000 00 |
| Five thousand dollars | 1,000,000 00 | 4,320,000 00 | ..... | 225,000 00 | 4,995,000 00 | 5,030,000 00 |
| Ten thousand dollars | 2,000,000 00 | 4,500,000 00 | ..... | 200,000 00 | 14,990,000 00 | 12,990,000 00 |
| Total | $81,302,563 00 | $81,302,563 00 | $54,545,334 00 | $54,545,334 00 | 79,520,424 00 | 79,520,424 00 |

*UNITED STATES CURRENCY of each issue and denomination ISSUED, REDEEMED, and OUTSTANDING at the close of the fiscal year 1882.*

OLD DEMAND NOTES.

[Issue began August 26, 1861, and ended March 5, 1862.]

| Denomination. | Total issued. | Redeemed to June 30, 1881. | Redeemed during fiscal year. | Redeemed to June 30, 1882. | Outstanding June 30, 1882. |
|---|---|---|---|---|---|
| 5s | $21,800,000 00 | $21,776,050 00 | $240 00 | $21,776,290 00 | $23,710 00 |
| 10s | 20,030,000 00 | 20,007,875 00 | 260 00 | 20,008,135 00 | 21,865 00 |
| 20s | 18,200,000 00 | 18,185,540 00 | 340 00 | 18,185,880 00 | 14,120 00 |
| Total | 60,030,000 00 | 59,969,465 00 | 840 00 | 59,970,305 00 | 59,695 00 |

UNITED STATES NOTES, NEW ISSUE.

[Issue began April 2, 1862, and ceased April 19, 1869.]

| Denomination. | Total issued. | Redeemed to June 30, 1881. | Redeemed during fiscal year. | Redeemed to June 30, 1882. | Outstanding June 30, 1882. |
|---|---|---|---|---|---|
| 1s | $28,351,348 00 | $27,525,445 55 | $12,205 60 | $27,537,651 15 | $813,696 85 |
| 2s | 34,071,128 00 | 33,407,647 20 | 17,198 40 | 33,424,845 60 | 646,282 40 |
| 5s | 101,000,000 00 | 99,594,750 25 | 217,441 00 | 99,812,191 25 | 1,187,808 75 |
| 10s | 118,016,000 00 | 112,820,191 00 | 381,930 00 | 113,202,121 00 | 4,807,879 00 |
| 20s | 102,920,000 00 | 99,068,807 90 | 389,492 00 | 99,458,299 90 | 3,461,701 00 |
| 50s | 30,055,200 00 | 29,541,485 00 | 47,750 00 | 29,589,235 00 | 465,965 00 |
| 100s | 40,000,000 00 | 39,245,490 00 | 72,900 00 | 39,318,390 00 | 681,610 00 |
| 500s | 58,986,000 00 | 58,511,500 00 | 54,500 00 | 58,566,000 00 | 420,000 00 |
| 1,000s | 155,928,000 00 | 155,301,500 00 | 82,000 00 | 155,383,500 00 | 544,500 00 |
| Unknown | ..... | 135,000 00 | ..... | 135,000 00 | ..... |
| | | | | | 13,029,443 00 |
| Deduct for unknown denominations destroyed in Chicago fire | ..... | ..... | ..... | ..... | 135,000 00 |
| Total | 669,321,676 00 | 655,151,816 00 | 1,275,417 00 | 656,427,233 00 | 12,894,443 00 |

UNITED STATES NOTES, ISSUE OF 1869.

[Issue began October 9, 1869, and ceased July 25, 1874.]

| Denomination. | Total issued. | Redeemed to June 30, 1881. | Redeemed during fiscal year. | Redeemed to June 30, 1882. | Outstanding June 30, 1882. |
|---|---|---|---|---|---|
| 1s | $42,456,812 00 | $41,719,153 25 | $112,110 40 | $41,831,263 65 | $625,548 35 |
| 2s | 50,511,920 00 | 49,633,547 00 | 178,027 60 | 49,811,574 60 | 700,345 40 |
| 5s | 50,581,760 00 | 42,023,164 75 | 2,287,604 00 | 44,310,768 75 | 6,270,991 25 |
| 10s | 85,221,240 00 | 61,034,240 00 | 3,818,594 00 | 64,852,834 00 | 20,368,406 00 |
| 20s | 73,162,400 00 | 49,324,398 00 | 3,225,334 00 | 52,549,732 00 | 20,612,668 00 |
| 50s | 30,200,000 00 | 26,314,050 00 | 520,595 60 | 26,834,645 00 | 3,365,355 00 |
| 100s | 37,104,000 00 | 28,679,150 00 | 920,800 00 | 29,599,950 00 | 7,504,050 00 |
| 500s | 44,890,000 00 | 44,443,000 00 | 43,500 00 | 44,486,500 00 | 403,500 00 |
| 1,000s | 79,700,000 00 | 72,090,000 00 | 786,000 00 | 72,876,000 00 | 6,824,000 00 |
| Unknown | ..... | 865,000 00 | ..... | 865,000 00 | ..... |
| | | | | | 66,674,864 00 |
| Deduct for unknown denominations destroyed in Chicago fire | ..... | ..... | ..... | ..... | 865,000 00 |
| Total | 493,828,132 00 | 416,125,703 00 | 11,892,565 00 | 428,018,268 00 | 65,809,864 00 |

## *UNITED STATES CURRENCY, &c.*—Continued.

### UNITED STATES NOTES, ISSUE OF 1874.

[Issue began July 13, 1874, and ceased September 13, 1875.]

| Denomination. | Total issued. | Redeemed to June 30, 1881. | Redeemed during fiscal year. | Redeemed to June 30, 1882. | Outstanding. |
|---|---|---|---|---|---|
| 1s | $18,988,000 00 | $18,544,115 00 | $128,166 00 | $18,672,281 00 | $315,719 00 |
| 2s | 16,520,000 00 | 15,997,649 00 | 192,692 00 | 16,190,341 00 | 329,659 00 |
| 50s | 24,440,000 00 | 12,112,415 00 | 1,329,645 00 | 13,442,060 00 | 11,017,940 00 |
| 500s | 28,000,000 00 | 23,443,500 00 | 479,500 00 | 23,923,000 00 | 4,077,000 00 |
| Total | 87,968,000 00 | 70,097,679 00 | 2,130,003 00 | 72,227,682 00 | 15,740,318 00 |

### UNITED STATES NOTES, ISSUE OF 1875.

[Issue began July 20, 1875, and ceased June 20, 1879.]

| Denomination. | Total issued. | Redeemed to June 30, 1881. | Redeemed during fiscal year. | Redeemed to June 30, 1882. | Outstanding June 30, 1882. |
|---|---|---|---|---|---|
| 1s | $26,212,000 00 | $23,404,651 80 | $1,411,496 60 | $24,816,148 40 | $1,395,851 60 |
| 2s | 23,036,000 00 | 18,233,072 20 | 2,436,897 40 | 20,669,969 60 | 2,366,030 40 |
| 5s | 46,180,000 00 | 23,745,931 00 | 6,235,093 00 | 29,981,024 00 | 16,198,976 00 |
| 10s | 23,660,000 00 | 7,942,709 00 | 2,579,327 00 | 10,522,036 00 | 13,137,964 00 |
| 20s | 25,000,000 00 | 7,751,708 00 | 2,157,228 00 | 9,908,936 00 | 15,091,064 00 |
| 50s | 2,000,000 00 | 428,295 00 | 168,885 00 | 597,180 00 | 1,402,820 00 |
| 100s | 16,200,000 00 | 4,713,270 00 | 1,041,680 00 | 5,754,950 00 | 10,445,050 00 |
| 500s | 28,400,000 00 | 21,936,500 00 | 585,000 00 | 22,521,500 00 | 5,878,500 00 |
| Total | 196,688,000 00 | 108,156,137 00 | 16,615,607 00 | 124,771,744 00 | 65,916,256 00 |

### UNITED STATES NOTES, ISSUE OF 1878.

[Issue began February 14, 1878, and still continues.]

| Denomination. | Total issued. | Redeemed to June 30, 1881. | Redeemed during fiscal year. | Redeemed to June 30, 1882. | Outstanding June 30, 1882. |
|---|---|---|---|---|---|
| 1s | $12,512,000 00 | $6,485,385 80 | $3,330,440 40 | $9,815,826 20 | $2,696,173 80 |
| 2s | 9,352,000 00 | 2,948,471 20 | 3,398,141 60 | 6,346,612 80 | 3,005,387 20 |
| 5s | 30,160,000 00 | 4,836,219 00 | 6,381,262 00 | 11,217,481 00 | 18,942,519 00 |
| 10s | 26,000,000 00 | 3,003,675 00 | 3,336,955 00 | 6,340,630 00 | 19,659,370 00 |
| 20s | 34,800,000 00 | 3,065,890 00 | 3,522,072 00 | 6,587,962 00 | 28,212,038 00 |
| 50s | 9,200,000 00 | 616,045 00 | 644,265 00 | 1,260,310 00 | 7,939,690 00 |
| 100s | 18,206,400 00 | 1,396,930 00 | 970,790 00 | 2,367,720 00 | 15,838,680 00 |
| 500s | 4,750,000 00 | 371,500 00 | 281,500 00 | 653,000 00 | 4,097,000 00 |
| 1,000s | 9,600,000 00 | 4,312,000 00 | 321,000 00 | 4,633,000 00 | 4,967,000 00 |
| 5,000s | 10,000,000 00 | 4,550,000 00 | 5,030,000 00 | 9,580,000 00 | 420,000 00 |
| 10,000s | 20,000,000 00 | 4,750,000 00 | 12,990,000 00 | 17,740,000 00 | 2,260,000 00 |
| Total | 184,580,400 00 | 36,336,116 00 | 40,206,426 00 | 76,542,542 00 | 108,037,858 00 |

### UNITED STATES NOTES, ISSUE OF 1880.

[Issue began March 16, 1880, and still continues.]

| Denomination. | Total issued to June 30, 1882. | Redeemed to June 30, 1881. | Redeemed during fiscal year. | Redeemed to June 30, 1882. | Outstanding June 30, 1882. |
|---|---|---|---|---|---|
| 1s | $24,051,497 00 | $801,620 00 | $3,375,913 00 | $4,177,533 00 | $19,873,964 00 |
| 2s | 19,664,000 00 | 218,539 00 | 1,870,540 00 | 2,089,079 00 | 17,574,921 00 |
| 5s | 26,400,000 00 | 272,617 00 | 1,385,138 00 | 1,657,755 00 | 24,742,245 00 |
| 10s | 15,840,000 00 | 260,038 00 | 768,815 00 | 1,028,853 00 | 14,811,147 00 |
| 20s | 1,280,000 00 | ..... | ..... | ..... | 1,280,000 00 |
| Total | 87,235,497 00 | 1,552,814 00 | 7,400,406 00 | 8,953,220 00 | 78,282,277 00 |

**The amount of United States notes presented for payment in coin during each month since the resumption of specie payments, is shown by the following table:**

| Month. | 1879. | 1880. | 1881 |
|---|---|---|---|
| January | $1,571,725 | $71,500 | $15,000 |
| February | 909,249 | 72,080 | 13,750 |
| March | 952,766 | 43,020 | |
| April | 699,773 | 16,000 | |
| May | 1,339,883 | 51,000 | |
| June | 2,503,302 | 47,200 | |
| July | 954,800 | 25,000 | |
| August | 981,400 | 22,000 | |
| September | 603,485 | 150,000 | |
| October | 740,295 | 9,000 | |
| November | 77,499 | 12,000 | |
| December | 122,359 | 25,000 | |

"Redemptions have for the present entirely ceased, no notes having been presented for payment in coin since March 1, 1881. The entire amount redeemed in coin since January 1, 1879, a period of two years and nine months, is only $12,029,086, an average of less than $365,000 a month. The total redemptions thus far are less than $3\frac{1}{2}$ per cent. of the United States notes outstanding, or a little more than one-tenth of one per cent. a month."

*Report of U. S. Treasurer, Oct.*, 1881.

## "UNITED STATES NOTES.

"The following statement shows the changes which have taken place in the denominations of United States notes outstanding at the close of each of the last four fiscal years:

| Denomination. | 1879. | 1880. | 1881. | 1882. |
|---|---|---|---|---|
| One dollar..... | $18,209,980 80 | $20,332,332 00 | $22,645,761 60 | $25,720,953 60 |
| Two dollars..... | 18,092,653 20 | 20,352,813 00 | 22,244,122 40 | 24,622,625 40 |
| Five dollars..... | 54,107,113 00 | 65,432,548 00 | 69,569,078 00 | 67,342,540 00 |
| Ten dollars..... | 64,638,562 00 | 74,916,751 00 | 76,990,387 00 | 72,784,766 00 |
| Twenty dollars..... | 60,470,887 00 | 72,143,207 00 | 71,271,597 00 | 68,657,471 00 |
| Fifty dollars..... | 25,523,340 00 | 24,808,995 00 | 23,702,910 00 | 24,191,770 00 |
| One hundred dollars.... | 32 038,480 00 | 32,797,870 00 | 32,947,660 00 | 34,469,390 00 |
| Five hundred dollars... | 32,569,500 00 | 19,224,000 00 | 14,570,000 00 | 14,876,000 00 |
| One thousand dollars.. | 35,070,500 00 | 16,532,500 00 | 12,024,500 00 | 12,335,500 00 |
| Five thousand dollars.. | 4,000,000 00 | 680,000 00 | 455,000 00 | 420,000 00 |
| Ten thousand dollars... | 2,960,000 00 | 460,000 00 | 260,000 00 | 2,260,000 00 |
| Total .. ..... | 347,681,016 00 | 347,681,016 00 | 347,681,016 00 | 347,681,016 00 |
| Less unknown denominations destroyed in subtreasury in Chicago fire | 1,000,000 00 | 1,000,000 00 | 1,000,000 00 | 1,000,000 00 |
| Outstanding..... | 346,681,016 00 | 346,681,016 00 | 346,681,016 00 | 346,681,016 00 |

"

*Report of U. S. Treasurer, Nov.*, 1882.

## Statute of Great Britain, as to Legal Tender quality of Bank of England notes.

"VI.—And be it further enacted, that from and after the "first day of August, 1834, unless and until Parliament shall "otherwise direct, a tender of a note or notes of the Gov- "ernor and Company of the Bank of England expressed to "be payable to bearer on demand, shall be a legal tender to "the amount expressed in such note or notes, and shall be "taken to be rated as a tender to such amount for all sums "above five pounds on all occasions on which any tender of "money may be legally made, *so long as the Bank of England "shall continue to pay on demand their said notes in legal coin:* "PROVIDED always, that no such note or notes shall be "deemed a legal tender of payment by the Governor and "Company of the Bank of England, or any branch bank "of the said Governor and Company; but the said Gov- "ernor and Company are not to become liable or be re- "quired to pay or satisfy, at any branch bank of the said "Governor and Company, any note or notes of the said "Governor and Company not made specially payable at such "branch bank; but the said Governor and Company shall be "liable to pay and satisfy at the Bank of England, in London, "all notes of the said Governor and Company, or of any "branch thereof."

3 and 4 William IV., chap. 98, § 6.

110-421

# Supreme Court of the United States.

October Term, 1883.

No. 9.

---

AUGUSTUS D. JUILLIARD, Plaintiff in Error,

*v.*

THOMAS S. GREENMAN.

---

Brief for the Defendant in Error.

The case presents a single question free from all incidental difficulty. That question is: Were the United States legal tender notes, tendered in this case, lawful money of the United States for the payment in which they were tendered? Certain statutes which may be traced back to that of Feb. 25, 1862, in authorizing the issue of notes such as these, had provided that they should be legal tender in payment even of private debts. (Chap. 33, v. 12, p. 345.)

In later years, when a portion of these notes had been retired and cancelled, another statute had provided that it should not be lawful to retire or cancel any more of the United States legal tender notes; but "they shall be re-issued and paid out again and kept in circulation." And the notes tendered in this case were notes re-issued and put in circulation under this provision. (May 31, 1878, chap. 146, v. 20, p. 87.)

The intent of Congress is plain. What it meant to forbid was the further retirement of the "legal tender notes." (See even its title.) Their numbers were not diminished.

It meant that the re-issued notes should retain that feature of their original character, if they did not any other. But in fact these re-issued notes were to retain their whole original character, as preceding statutes had fixed it. If they did not, what then were they? What law knew them? This is the construction which must be given to the like provision in other statutes. (See Dec. 17, 1860, chap. 1, s. 10, v. 12, p. 122; July 17, 1861, chap. 5, s. 6, Id. p. 260; Feb. 25, 1862, chap. 33, s. 1, Id. p. 345; Mar. 3, 1863, chap. 73, s. 3, Id. p. 711.)

These re-issued notes were and are a part of the public debt of the United States, as much as those in whose place they have been issued. (Bank *v.* Supervisors, 7 Wall., 30). This, whether they are or are not legal tender. (Id.)

But this does not affect the present question, if Congress has authority of its own legislative will to give to them the quality of legal tender; and this is the main point here at issue, and to be treated later. At present it is enough to show what is the plainly expressed will of Congress, that this will was that the re-issued notes should be legal tender like those which had been redeemed.

Thus these notes were plainly a legal tender, if Congress had constitutional authority to make them so. If such authority is wanting, as the plaintiff in error contends, it is because Congress has, under the Constitution, no authority to make any thing to be legal tender, save gold and silver coin. Whether or not the authority of Congress is thus restricted is the question at bar.

For the purpose of argument it is here conceded that this is now an open question. Not that the decision now in force in the affirmative of this question rests wholly, or even chiefly, upon the war powers of Congress, but rather because, as the plaintiff's brief notices, the full number of justices, who in all considered this question, were equally divided; and therefore the present members of this Court may prefer that so large a question should be argued as

only an open question can be. (Legal Tender Cases, 12 Wall. 457. See also Hepburn *v.* Griswold, 8 Id. 603.)

The question thus raised is of course to be determined ultimately by the terms of the Constitution of the United States. But there was law upon this subject before the formation of that Constitution; law governing, and known by, those who adopted that instrument as their great charter.

The propositions most relied upon to establish the unconstitutionality of legislation such as this now in question, are these, one dependent upon the other: —

*First*, A contract to pay money is a contract to pay a specified weight of lawfully stamped gold or silver, according to the law of coinage of the date of the contract. (Bronson *v.* Rodes, 7 Wall. 250; Butler *v.* Horwitz, Id. 260; Hepburn *v.* Griswold, 8 Id. 624.)

*Second*, Accordingly, any change in the law of coinage thereafter, if allowed to operate upon that pre-existing contract, would impair its obligation. (Hepburn *v.* Griswold, 8 Wall. 622, 624, 625; Legal Tender Cases, 12 Id. 580, 661.)

Of these propositions the first question to be considered is, Are they propositions of law? Does our system of law assert them? First, were they a part of the common law? If not, have they been made a part of the statute law of the United States?

The law in relation to legal tender is, then, open for examination in this case. The first part of such examination must be directed to the common law, as it was before the adoption of the written Constitution, the interpretation of whose terms is the direct question here to be determined.

## PART FIRST. — THE COMMON AND CONSTITUTIONAL LAW OF ENGLAND AND AMERICA DOWN TO 1777.

The first proposition that I shall draw from that source, for the foundation of my argument, is this: —

I. At common law a judgment for money must be rendered in money of account.

Ward *v.* Bidgwin, Latch 84. Here it appears that only lawful money can be recovered in a judgment proper for money. Other money must, in the first instance, be regained as a commodity by a judgment for a return.

It here, at first sight, seems, also, that a judgment may be rendered in any money which is legal tender; as asserted in Butler *v.* Horwitz, 7 Wall. 260.

But this is not the true principle, as appears by Dixon *v.* Willoughs, Salk, 446 (vol. 1). Here the money promised (guineas) was lawful money, but the declaration did not demand that coin. It ran in money of account, as C. J. Holt declared; it ran in pounds, when there was no such coin as a pound. (Ways and Means of Payment, S. Colwell, Pa. 1859, p. 130.)

Money of account is mere expression of money: its denominations do not denote specific coins or weights of precious metal. (Id. pp. 32, 33.)

II. Judgments running in mere money of account, in distinction from any description of actual money, payment of them cannot be required in any particular variety of money. They must be payable in any lawful money. (Wade's Case, Coke's Reports, Part 5, p. 114.)

All lawful money is of known value, as recognized in the last but one cited case.

From that form of judgment, also, it follows, that it is not the duty of the court rendering the judgment to determine in what material it shall be paid: the judgment leaves that question open.

III. That question cannot be determined by reference to the date of the original contract. That contract has ceased to exist; and the judgment — still less the execution which is issued thereon — need not preserve the date of the contract. The only significant date now is the day of demand or tender in payment of the execution; the only question, what on such day is lawful money.

These are American cases following these old English decisions. (Stewart *v.* Biddack, 2 Dall, 158; Brown *v.* Barry, 34 Id. 365 (369).

IV. This principle was not displaced by a change in the law of legal tender made between the date of the contract and the time of payment. (Pong *v.* De Lindsay, Dyer 82 b., vol. 1; Barrington *v.* Potter, Id. 81 b.; The Mixed Money, Davies (Irish), 48 (73).

V. These principles imply an unlimited discretion in the sovereign (whether king or parliament), to establish and change the legal tender, as a part of the constitutional law of England. So it was. (Mixed Money, p. 55.)

VI. This principle of English constitutional law, established earlier than the English settlement of America, came hither with that settlement in theory and in fact. (Plymouth Colony Laws, 149, Act of June 7, 1666; Mass. Records, vol. 3, 258, Act of May 27, 1652; Mass. Perpetual Laws, 1692–1745, p. 295, Act of 1741, chap. 4; Laws of North Carolina, chap. 10, sect. 12, 1748. See also dissenting opinion of Mr. Justice Story, in Briscoe *v.* Bank of Kentucky, 11 Peters, 333.)

VII. When these American Colonies had begun to act independently of the British Crown, they exercised this prerogative which had once belonged to that crown, more freely than before, all of these colonies. For examples, see Laws of New Hampshire, July 3, 1776, p. 11; Nov. 18, 1779, p. 168. New Jersey Laws, App. p. 3, Sept. 20, 1776. Pennsylvania State Laws, vol. 1, p. 7, Jan. 29, 1777. Hanson's Laws of Maryland, 1763–1784, 1777, chap. 9.

VIII. The Plymouth statute of 1666 seems intended to require judgments to be rendered in money of account, as also a Maryland statute of 1781, chap. 16. This is to be implied in the other statutes which allow judgments to be paid in more than one kind of lawful money; and such allowance appears to have been nearly universal in American statutes before 1789. (Hanson's Laws of Md.)

IX. Further, none of the original constitutions of the original thirteen States expressly conferred any legislative power over the currency. Those States, then, must have exercised this as an inherent power of government. Neither did the royal charters confer such powers. (Poore's Fed. and State Constitutions.)

PART SECOND. — THE LAW OF RENDERING AND PAYING JUDGMENTS UNDER THE UNITED STATES CONSTITUTIONS OF 1777 AND 1789.

X. But a written national Constitution of these United States is to be found as early as 1777; and the Continental federate Congress, under its authority on March 18, 1780, regulated the value of bills of credit. Thus all the governments over the people of the United States prior to 1789 appear actually to have treated paper currency as lawful money. (Journal, vol. 3, Aug. 1, 1778, to March 31, 1782, p. 442.)

XI. Bringing together the powers over the currency conferred respectively by the constitution of 1777, and by that of 1789, upon the law-making power under each, they appear as follows: —

(A) The early American Congress had authority, —

1. "To borrow money and emit bills on the credit of the United States." (Art. 9.)

2. To regulate "the alloy and value of coin struck by their own authority or by that of the respective States." (Id.)

These powers were conditional; they were not to be exercised "unless nine States assent to the same." (Id.)

Then there was no prohibition on the States to coin money, emit bills of credit, or in the matter of legal tender.

Also, by the rule of interpretation declared by this constitution, each State was to retain every power not expressly delegated to the United States. (Art. 2.)

(B) The present Congress has absolute power, —

1. "To borrow money on the credit of the United States."

2. "To coin money, regulate the value thereof and of foreign coin." (Art. 1, sect. 8.)

The several States are prohibited to coin money, emit bills of credit, and to make any thing but gold and silver coin a tender in payment of debts. (Art. 1, sect. 10.)

Then, by its rule of interpretation, there are reserved to the States or the people only the powers not delegated to the United States, *nor prohibited to the States.* (Amendments, Art. 10.)

XII. Before proceeding with the discussion of these constitutional provisions in their more direct bearing upon the question at bar, let me consider how under these provisions, which went into force in 1789, the matter of money of account was to be regulated.

The first thought would be that each State might regulate its own money of acount, for the accounts to be kept and the proceedings to be had therein. Suppose they did so regulate that matter. They could not then independently provide what currency, coin, or paper should answer the calls of the expressions of their respective moneys of account; for they have no power to ascertain the value of money, even of gold or silver coin. Still less can they make any thing else to be legal tender.

In substance the several States have no power left, even in the matter of a legal tender of the precious metals, and, consequently, no practical power in the matter of money of account.

Practically, this matter must be regulated by Congress; and the several States must adopt its regulations. This is what has actually been done. See U. S. Stat. at L. 1, 230, 1792, April 2, chap. 16, sect. 20; R. S. 3563. And in case of Mass. see P. S. chap. 77, sects. 1 and 2, p. 426; G. S. chap. 53, sects. 1 and 2, p. 292; R. S. of 1836, p. 307, chap. 35, sects. 5 and 6, referring to 1794,

42, 1. For other States, see recital of Mr. Justice Clifford in Legal Tender Cases, 12 Wall. 576; also report in relation to the establishment of a mint of April 8, 1786; and Ways and Means of Payment, Stephen Colwell, Pa. 1859, 141.

XIII. This 20th section of the coinage act does not relate to the payment of accounts or of judgments: it relates to the keeping of accounts, and the rendering of judgments; it directs simply what expression of money shall be used therein. It directs unity of expression. It recognizes no varieties of dollars, and allows no qualification of the word. If it did, there could be no uniformity of expression, but great confusion and uncertainty.

This is the construction given by Congress to this section. See Cheang-Ke *v.* United States, 3 Wall. 320; and Stat. at L. 13, 495, March 3, 1865, chap. 80, Id. 17, 602; March 3, 1873, chap. 268, sect 1.

XIV. If judgments under the laws of the United States are to be rendered in money of account, it would follow therefrom that they were payable in whatever was legal tender at the time of payment, whether it was or was not so at the date of the judgment or of the original contract.

XV. But this is a matter not to be left to mere inference: it is a matter of history. The Constitution of the United States, through the legal tender act of 1792, operated upon pre-existing contracts to pay paper money, and turned them into contracts to pay gold and silver.

First Statute, p. 250, chap. 16, sect. 16; Faw *v.* Marsteller, 2 Cr. 10 (29, 31); Downman *v.* Downman's Ex'rs., Wash. Rep. 26.

XVI. It has now been made to appear that, neither at common law nor under the statutes of the United States is a contract to pay a stated sum of lawful money, no matter how specifically described, a contract to pay a specific weight of lawfully stamped silver or gold.

XVII. Such a contract is answered by whatever is lawful

money at the time of payment, although it may not have been lawful money at the date of the contract, alike under American as well as English law, before and since the adoption of the Constitution of the United States.

PART THIRD. — THE PRESENT CONSTITUTIONAL PROVISIONS AFFECTING THE MATTER OF LEGAL TENDER.

XVIII. This argument has thus far made this ground for the affirmative side of this question: —

1. No prohibition against Congress making a paper legal tender could be raised by implication, even out of a provision that Congress should make no law impairing the obligation of contracts, if there were such a provision in the Constitution.

2. A discretionary, unlimited authority in the matter of legal tender is an inherent attribute of sovereignty, American as well as European. Wherever there is a sovereign government the possession of this power is to be presumed. Its absence must be proved.

3. The law of legal tender as between man and man, as it was in England, is the law of the United States. This raises a presumption that the constitutional law, as between the State and the people, is the same in the United States as in England; that is, that the sovereign power of the United States has unlimited authority in the matter of legal tender.

4. The Constitution contains no prohibition whatever against Congress making a paper legal tender.

From these preliminary remarks this brief passes to consider the terms of the Constitution itself.

XIX. Here the first proposition is this: the authority of Congress is unlimited over the constitutional currency, whatever that may be; whatever is constitutional material of currency Congress may make and unmake to be legal tender as Congress in its discretion sees fit.

XX. My second proposition is, that paper money is such

constitutional currency. The case which I first cite, in support of this proposition, is that of the Veazie Bank *v.* Fenno, 8 Wall. 533.

(A) This question came into this case in this way, or rather it created this case in this way: Congress, having authorized the issue of paper currency for the whole country, had undertaken to protect that currency by what may be called a prohibitory tax upon the previously authorized currency of the State banks. This bank had declined to pay this tax, alleging it to be unconstitutional; and this was the question which came before the Court. A majority of the Court held the tax to be constitutional. This conclusion was reached through the necessary premise that Congress was authorized to provide a paper currency as it had done, and from this premise there was no dissent among the members of the Court. The constitutionality of a national paper currency was affirmed in another case at the same term (Hepburn *v.* Griswold, 8 Wall, 603); and to this extent the Court was unanimous in both cases.

(B) In 1819 this Court unanimously decided that Congress had authority to incorporate a National Bank to issue bank bills which should be used as currency; and, a few years later, this doctrine was re-affirmed. (McCulloch *v.* Maryland, 4 Wh. 318, 424; Osborn *v.* Bank, 9 Wh. 738.

(C) In 1837 the Court decided unanimously that a State could incorporate a bank which should issue bills to serve the purpose of currency, and this decision has been thrice affirmed. (Briscoe *v.* Bank of Kentucky, 11 P. 257; Woodruf *v.* Trapnall, 10 H. 205; Darrington *v.* Bank of Alabama, 13 Id. 12; Curran *v.* Arkansas, 15 Id. 317.)

This because the State was sovereign.

XXI. If this is a power incident to sovereignty, then these four last-named decisions unite with the two former in attributing the power to authorize a paper currency to the government of the United States, which is as sover-

eign as any of the States. These six decisions are more than supported by the later decision, directly to the point, in Veazie Bank *v.* Fenno, which is itself supported by Hepburn *v.* Griswold, as has been mentioned.

It may then be assumed as indisputable constitutional law that Congress is authorized to establish a paper currency.

XXII. Congress has the same power over all the varieties of constitutional currency. It may make and unmake each and all of them to be legal tender at its discretion.

XXIII. But, if Congress has a constitutional authority to provide a paper currency, the provisions which confer it may be found; and an examination of those provisions ought to show whether it is conferred with or without the restriction here in question.

This power may be traced to one or more of four different sources: —

1. The power to regulate commerce. 2. The coinage power. 3. The authority to emit bills of credit. 4. The prohibition on the States to make a paper legal tender.

XXIV. Let us consider first the power of Congress to regulate commerce with foreign nations, and between the several States.

Mr. Webster thought this power involved an implied power to provide a paper currency for the whole country; and this Court has declared that Congress is authorized to fit the bills of such a currency for use in all the transactions of commerce.

Works, vol. 4, p. 338; 8 Wall, 548.

The most important transaction of commerce involving the use of currency is the payment of debts. True, commerce can make use of some currency which is not legal tender, but it cannot do without legal tender altogether. In commercial transactions a legal tender is indispensable, as indispensable as telegraphic communications; and these

latter have been found subject to the control of Congress, as instruments of commerce. (Pens. Tel. Co. *v.* W. U. Tel. Co. 96 U. S. 1.)

If Congress is authorized, as a measure towards the regulation of commerce, to issue a paper currency, it is authorized to give to that currency any legal character which commerce requires. The duty of Congress to provide a paper currency for such a purpose could not be implied if all power over the matter of legal tender had been left elsewhere, say, in the several States.

XXV. The next source of this authority is the power to coin money, regulate the value thereof and of foreign coin. This provision substantially came over from the earlier Constitution. There, however, the phraseology was more restricted, as has already been shown. Yet that Congress, under that provision, proceeded to ascertain the value of a paper currency; not only of bills issued by itself, but also of bills issued by the respective States: so that this piece of legislation could not be assigned to the power to emit bills; it must fall within the power to ascertain the value of money. Thus phraseology, narrower than that under consideration, had before 1789 been construed to include paper money.

(E) The word "money" in this clause is used in two other places in the Constitution, where it must have the broader meaning. Congress may borrow as money whatever is actually used as such in the transactions of commerce; and Treasury notes and bills of national banks in the Treasury can be drawn out only in consequence of appropriations made by law. (Art. 1, sects. 8, 9.)

(F) The word "coin" in the Act of March 3, 1865, in relation to judgments for duties on imports, must be capable of including paper money. (Chap. 80, vol. 13, p. 495.)

(G) This is the correct construction. Contracts for the payment of notes of the bank of England might come into the courts of the United States for enforcement. It

must be that Congress would have the power to provide at what rate the denominations of those notes should be reduced to dollars and parts of a dollar.

(H) Congress has actually exercised this power. Its first legislation under the coinage clause was to fix the value of the pound sterling of Great Britain, when there was no such coin in existence, nothing but pound notes, paper money. It did this, knowing that it was operating not upon coin. Its expressed purpose was "that all foreign coins *and currencies* shall be estimated according to the following rates." (July 31, 1789, chap. 5, sect. 18, vol. 1.) Thus the first Congress understood its power to ascertain the value of foreign coin to include all foreign currencies.

XXVI. If the coinage power covers paper currency, then Congress has authority to coin paper money, and regulate its value. Each of these powers is a power to make legal tender.

XXVII. In his report in 1816 Mr. Dallas, Secretary of the Treasury, mentions a national substitute for the national coin as something which it might be necessary to provide. The Constitution of the United States has hitherto been construed as capable of opening to allow such provision. (McCulloch *v.* Maryland, 4 Wh. 415; Pens. Tel. Co. *v.* W. U. Tel. Co., 96 U.S., 1, [9].)

XXVIII. In Veazie Bank against Fenno the Court unhesitatingly speak of the bills of national banks and of Treasury notes as bills of credit, and speak of an authority in Congress to emit such bills as settled by "the uniform practice of the government and by repeated decisions." (8 Wall, 548.)

(J) There is no doubt that the prohibition to emit bills of credit applies to those bills alike, whether they are or are not legal tender. (8 Wall. 552.) The authority to emit them must have the same extent as the prohibition; for this authority is an authority by implication, and thus

without restriction. Whether they shall be made legal tender or not rests in the discretion of Congress, as formerly it rested in the Colonial and State Legislatures.

XXIX. But whence did Congress derive this authority? No judicial opinion answering this question has been found. In the absence of judicial guidance the next best leader may be followed. Mr. Webster believed that Congress had authority to emit bills of credit, which he believed was an authority to provide a paper currency. And he held a definite opinion as to its source. He says, "But the Constitution does not stop with this grant of the coinage power to Congress. It expressly prohibits the States from issuing bills of credit." This is the Constitution's own method of interpreting itself. No power prohibited to the States is reserved away from the United States. (Works, vol. 4, p. 336; Amendments, Art. 10.)

XXX. Between the constitutional provisions in relation to bills of credit and in relation to legal tender, there is a historical difference worth noticing.

(K) The prohibition in relation to tender first appeared not as an absolute, but as a conditional, prohibition. It was placed among the things which were not to be done without the consent of the national legislature. (Elliot's Debates, 229.) Here was a plain implication that the supreme control over this matter was to be in Congress, — an implication not at all weakened by the subsequent making absolute of the prohibition.

(L) On the other hand the power to emit bills of credit was in the Continental Congress under the Constitution of of 1777; further, it was brought over into the present instrument so far as to be in the draft which was submitted by the committee to the convention. In convention the words conferring it were stricken out (Elliot's Debates, 224) yet it has found a place in that instrument by implication.

XXXI. Is not the implication of an unlimited power in

the matter of legal tender at least as easy and obvious? As the Constitution has directed its own interpretation, is not the power to make a paper legal tender a power delegated to the United States?

THOMAS H. TALBOT,
JAMES McKEEN,
*For the Defendant in Error.*

# In the Supreme Court of the United States.

In its Original Jurisdiction.—October Term, 1882.

THE STATE OF IOWA, *in the relation of*
BUREN R. SHERMAN *its Governor*,

*vs.*

NOAH C. MCFARLAND, *Commissioner of the General Land Office.*

## Amended Petition in Mandamus.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, in session 1882, at the city of Washington, in the District of Columbia:*

The petition and relation of the State of Iowa, by Buren R. Sherman, its Governor, humbly showeth that, by a supplemental act of Congress passed and approved March 2d, 1845, for the admission of said State into the Union, found at page 789, vol. 5, of the Statutes at Large, it was stipulated, in the 5th clause of the 6th Section of said act, that the Government of the United States would pay to the said State 5 per cent. upon the sales of the public lands in said State.

In consideration for the 5 per cent. so reserved and agreed to be paid, the State aforesaid stipulated four things:

1st. That the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof; 2d, and that no tax shall be imposed on lands the property of the United States; 3d, and in no case

shall non-resident proprietors be taxed higher than residents; 4th, and that the bounty lands granted, or hereafter to be granted, for military services during the late war shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the State, whether for State, county or township, or any other purpose, for the term of three years from and after the dates of the patents respectively.

And your petitioner avers that said State did, by ordinance of its convention duly adopted, accept all of the stipulations and conditions contained in 5th clause of the 6th Section of said act of Congress; and that said State has, at all times, faithfully kept and performed each and every of the said stipulations and conditions.

Your petitioner would further make known to this Honorable Court that, under the provisions of the act of Congress entitled "An act to settle certain accounts between the United States and the State of Mississippi and other States," approved March 3d, 1857, (Statutes at Large, vol. 11, p. 200), it is the duty of the Commissioner of the General Land Office, when required so to do, to state an account between the United States and the said State of Iowa upon the same *principle and allowance* as prescribed in the "act to settle certain accounts between the United States and the State of Alabama," approved March 2d, 1855, (Stat. at Large, vol. 10, p. 630.) And your petitioner avers that the *principles and allowance*, as prescribed by said last-named act, requires, and makes it the duty of the Commissioner of the General Land Office, upon proper application therefor, to state an account between the United States and the said State of Iowa for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, under the act of March 2d, 1845, for the admission of said State into the Union, on account of lands lying within said State, disposed of by the United States for, or in the satis-

faction and redemption of, military land warrants issued by the United States for military services. And in this connection your petitioner would state that, prior to the dates of the passage of said acts of 1855 and 1857 respectively, the 5 per cent. on the cash sales of the public lands lying within thesaid States of Alabama and Mississippi had been regularly and periodically paid to said States respectively, so that at the dates of the passage of the last-named acts there were no unsettled accounts growing out of the 5 per cent. clause of the acts for the admission of the States of Alabama and Mississippi respectively into the Union, except for lands entered and purchased with military land warrants.

Your petitioner would further make known to this Honorable Court that the Government of the United States, in disposing of the public lands by sale in this and other Western States, adopted two methods: one for cash, the other for the redemption of her outstanding military warrants or obligations, calling for a specific quantity of land issued to the soldiers that had enlisted and served in the different wars of the country, under certain statutory provisions of law enacted in advance of their enlistments, and as a compensation for their military services chiefly in the three great wars of this country, namely: the Revolutionary war, the War of 1812, and the Mexican war, and subsequently to all others, including the Indian wars.

And in this connection your petitioner would state that by the Act of Congress of August 14th, 1848, (9 Stat., 332), military land warrants were made receivable at the rate of $1.25 per acre for the number of acres therein contained, in payment for any of the public lands subject to private entry; and that by the act of March 22d, 1852, (10 Stat., p. 3), all military land warrants theretofore, and thereafter, issued were made assignable by the persons to whom they were issued, and also made receivable from such assignee at the rate aforesaid per acre in payment for any of the public

lands located and taken up under the pre-emption laws of the United States.

Your petitioner would further make known to this Honorable Court that heretofore the 5 per cent., at stated and proper periods, has been allowed and paid to the State on cash sales, but that on lands located and purchased with military warrants, the 5 per cent. has been persistently and unlawfully withheld from the State. That, agreeably to the annual report of the Commissioner of the General Land Office, made in the year 1871, there had been taken up and purchased with land warrants in the State of Iowa, $14{,}096{,}905\frac{77}{100}$ acres of land, on which the 5 per cent., at a value of $1.25 per acre, would amount to $881,006.60, being the sum, more or less, that is now due to the State, but which the Government, by its officers, refuses to pay, although a demand was made of the Hon. Noah C. McFarland, Commissioner of the General Land Office at Washington, D. C., on the *19th* day of *September*, 1882, in writing by R. P. Lowe, the duly commissioned agent of the relator, who received his appointment from the Governor of the State, and who was authorized so to do by two several joint resolutions, copies of which are hereto attached and made a part of this application.

In this last demand the Commissioner, aforesaid, was requested to state an account between the United States and the State of Iowa, for the purpose of ascertaining what sum of money is due said State, heretofore unsettled under the 5 per cent. clause of the sixth section of the supplemental act of Congress passed and approved March 2, A. D. 1845, for the admission of the State of Iowa into the Union, found on page 789, vol. 5, of the Statutes at Large, and that he transmit said account, so audited and stated with the proper vouchers and certificates, to the First Comptroller of the Treasury for his inspection and action, referring him, for his authority and duty to do so, to the several acts of Congress

hereinafter more particularly described. Nevertheless, the commissioner aforesaid refused to state said account aforesaid, and still does refuse, to the great damage and injury of said State of Iowa; notwithstanding the claim itself set up by said State is a legal and just claim, and that she is legally entitled to have the aforesaid account stated, to the end that said claim may be finally awarded and paid to her.

Your relator further suggests and makes known to this Honorable Court that the duty of the commissioner, aforesaid, to state such an account between the Government and the State of Iowa for the purpose of ascertaining what sum or amount of money is due said State, heretofore unsettled, under the 5 per cent. clause of the sixth section of the supplemental act passed and approved March 2, 1845, for the admission of the said State into the Union, is purely ministerial and mandatory in its character, leaving no room for the exercise of his own judgment and discretion in the performance of the same. The said acts or statutes so prescribing his duties in the premises are found in section 456 of the Revised Code, and especially in the acts of Congress passed and approved respectively, March 2, 1855, and March 3, 1857, entitled, as aforesaid.

And your relator further makes known to your Honorable Court here, that it is entirely without remedy in the premises, unless the same be afforded by the power and interposition of this court in granting its writ of mandamus. And your relator therefore prays that a writ of mandamus may issue out of this Honorable Court, directed to the said Noah C. McFarland, Commissioner, as aforesaid, of the General Land Office, commanding him to state an account between the United States and the State of Iowa in the manner and for the purpose herein above stated and prescribed, in order that the account so stated may be transmitted to the First Comptroller of the Treasury for his examination and

action to the end, that the same may be allowed and paid by the United States to your relator; and that this Honorable Court may make such other and further orders in the premises as the case may require, and as to right and justice may appertain.

By the Governor,

BUREN R. SHERMAN.

*March 1, 1883.*

RALPH PHILIPS LOWE,

*Att'y for the Relator.*

DISTRICT OF COLUMBIA.

Ralph Philips Lowe, agent of the relator, &c., on oath, states that the statements made in the foregoing petition of his own knowledge are true, and those made on information and belief he believes to be true.

RALPH P. LOWE.

Sworn to and subscribed to before me this 27th day of September, 1883.

[SEAL.] ARCHIBALD HOPKINS,

*Ch. Clerk Court of Claims.*

---

DEPARTMENT OF JUSTICE,

WASHINGTON, D. C.

With the approval of the court I hereby consent that the within and foregoing amended petition may be filed to take the place of the original petition, and that the rule heretofore issued in said cause may be amended accordingly.

S. F. PHILIPS,

*S. Gen'l, &c.*

*September 28th, 1883.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1883.

---

The answer of Noah C. McFarland, Commissioner of the General Land Office, to the rule in the case of a petition by the State of Iowa, asking for a mandamus against this respondent in respect of a certain claim for 5 per cent. of the net proceeds of public lands disposed of by the United States to the holders of bounty land warrants.

This respondent admits that upon the state of facts set forth in such petition as the same are modified and explained by those hereinafter set out, he has refused to state an account between the United States and the State of Iowa of the matters in such petition mentioned. And for cause of such refusal he saith:

1. That neither the act of 1845 for the admission of the State of Iowa into the Union nor those of 1855 and 1857, mentioned in said petition, authorize that State to claim a percentage upon such of the public lands within its boundary as have been disposed of by the United States to the holders of bounty land warrants;

2. That if the original meaning of these acts were otherwise, still contemporaneous construction thereof by the General Land Office and the State of Iowa in numerous and important transactions, each of which suggested a question as to such construction, if one existed, have established the meaning first-above suggested, as between the State and this respondent; and

3. That in 1858 the State of Iowa made a formal demand upon the Secretary of the Interior, as the official superior of the then Commissioner of the General Land Office, to be allowed the percentage now claimed, and that the same was refused, with reasons; whereupon the State practically acquiesced in such ruling until the date of the present demand, twenty-five years thereafter, confining its efforts in the mean time to applications to Congress for a change in the statutes above mentioned.

In general connection with the points of defense above stated, this respondent shows that considerable as the present claim is, the table marked "A" in the appendix, which is a true extract from the books of the General Land Office, and which the respondent makes a part of his answer, will show that the principle involved affects more than four times the amount here in issue, or, in all, the proceeds of 63,322,603.34 acres of public land.

He also shows that, beginning with August 25, 1848, and ending upon July 17, 1858, eleven different settlements have been had in the General Land Office with the State of Iowa for the percentage due to the latter under the act for its admission as a State, which settlements

occurred at reasonably regular intervals, and covered in all some $580,710.49—as will appear by reference to Appendix B—part of this answer—and that in none of these, as this respondent is informed and believes, was the present claim suggested, although during the same period large amounts of the public lands lying within that State were disposed of by the United States from time to time to holders of land warrants. No *table* exists in this office to show the amounts of land so disposed of *year by year* within the several States; and upon examination the labor and time required for making such an exhibit seem to be so great as to be unwarranted by the purposes of this particular defense—as the latter seems to be sufficiently pleaded without resorting to such details—but this respondent has ascertained, as an illustration of what has just been set out, that, taking within that period three of the earliest years during which the disposal under land warrants of the public lands within the State of Iowa had attained such magnitude as necessarily to have attracted the attention of the State, *i. e.*, during the years 1853, 1854, and 1855, 1,072,798.31 acres, 748,073.82 acres, and 2,310,659.16 acres, respectively, were so disposed of. Upon the course of dealing of which the above is a sample this respondent relies as establishing a contemporaneous practical construction to the effect that the present claim is unfounded in point of law. And this contemporaneous practical construction has governed all transactions with the nineteen States which are interested in the statutory provision now under consideration.

This respondent also shows that upon the 7th day of September, 1858, the then governor of Iowa made a de-

mand upon Secretary Thompson, then of the Interior, for an allowance upon the principle now in controversy, and that the latter replied upon the 20th of the same month, as follows:

DEPARTMENT OF THE INTERIOR,
*September* 20, 1858.

In reply to your letter of the 7th instant, in relation to the application for an allowance of five per centum, claimed to be due the State of Iowa, on military land warrant locations, I have the honor to state that, in my opinion, the act of 1847, to which you refer, is a bounty-land act, and that no distinction can properly be made between locations made under it and those made under other bounty-land laws. The location of warrants issued under the act of 1847 is not considered as constituting a sale of the public lands, as contemplated by the act admitting Iowa into the Union. That act appropriates five per cent. of the *net proceeds of sales* of all public lands for making public roads and canals within the State. There being *no net proceeds* accruing from locations by military land warrants, the allowance of five per centum on such locations cannot be regarded as having been appropriated or provided for by law.

J. THOMPSON,
*Secretary.*

GOV. R. P. LOWE, *Iowa.*

This respondent is informed and believes that the transaction just stated constitutes the only demand ever made by the State of Iowa, or by any other State, upon the Secretary, or upon the Commissioner of the General Land Office, in accordance with the claim now set up; and that the construction therein suggested by the Secretary was practically acquiesced in by Iowa ever since, no further demands of that sort having been made, although, as will appear by Table No. 2, Appendix, seven other settlements were afterwards made for money due under the statute

now under consideration. True it is that within a few years past the State has applied to Congress for legislation recognizing its present claims, but such application was not only not contradictory to, but was even confirmatory of, the acquiescence and practical construction hereinbefore alleged and relied upon.

As a separate and distinct defence, this respondent also submits that in any event the effect of the above dealings has been to render it a matter of executive discretion whether he should comply with this demand upon behalf of the State of Iowa.

Wherefore he prays that he may be hence dismissed, &c.

S. F. PHILLIPS,
*Solicitor General.*

DISTRICT OF COLUMBIA,
*Washington City:*

Noah C. McFarland, the defendant above named, maketh oath that the several matters and things in the foregoing answer stated are true to the best of his knowledge and belief.

N. C. McFARLAND.

Signed in my presence and sworn to before me this August 30th, 1883.

GEO. M. LOCKWOOD,
*Notary, &c.*

EXHIBIT A.

GENERAL LAND OFFICE,
*Washington, D. C., August* 18, 1883.

*Statement of the total number of acres located with military bounty land-warrants under the various acts in the several land States to June* 30, 1882.

| States. | Acres located to June 30, 1878. | 1879. | 1880. | 1881. | 1882. | Total. |
|---|---|---|---|---|---|---|
| | | *Acres.* | *Acres.* | *Acres.* | *Acres.* | |
| Alabama | 1,159,571.17 | .... | 40 | 80 | 200.00 | 1,159,891.17 |
| Arkansas | 2,260,706.92 | 200 | 200 | 200 | 400.00 | 2,261,706,92 |
| California | 768,973.24 | 30,340 | 10,280 | 5,680 | 880.00 | 816,183.24 |
| Colorado | 193,660.00 | 640 | 1,580 | 40 | 480.00 | 196,400.00 |
| Florida | 468,643.24 | 440 | 880 | 880 | 1,349.89 | 472,193.13 |
| Iowa | 14,099,825.77 | ..... | ..... | 120 | ..... | 14,099,945.77 |
| Illinois | 9,533,853.00 | ..... | ..... | ..... | ..... | 9,533,853.00 |
| Indiana | 1,312,436.65 | ..... | ..... | ..... | ..... | 1,312,436.65 |
| Kansas | 4,326,299.95 | 5,320 | 11,440 | 2,000 | 716.47 | 4,345,776.42 |
| Louisiana | 1,158,282.50 | 200 | 1,280 | 1,160 | 1,159.33 | 1,162,081.83 |
| Michigan | 4,320,515.78 | 4,040 | 41,800 | 44,560 | 30,440.00 | 4,441,355.78 |
| Minnesota | 5,389,051.81 | 840 | 2,920 | 2,040 | 640.00 | 5,995,491.81 |
| Missouri | 6,818,828.89 | 120 | 200 | ..... | ..... | 6,819,148.89 |
| Mississippi | 384,697.73 | 40 | 320 | 40 | ..... | 385,097.73 |
| Nebraska | 1,937,398.05 | 880 | 3,680 | 760 | 2,160 00 | 1,944,878.05 |
| Nevada | 10,580.00 | 160 | ..... | ..... | ..... | 10,740.00 |
| Ohio | 1,817,501.99 | .... | ..... | ..... | ..... | 1,817,501.99 |
| Oregon | 78,709.14 | 320 | 880 | 440 | 560.00 | 80,909.14 |
| Wisconsin | 6,465,681.82 | 120 | ..... | 280 | 960.00 | 6,467,041.82 |
| | 63,105,217.65 | 43,660 | 75,500 | 58,280 | 39,945.69 | 63,322,603.34 |

## EXHIBIT B.

GENERAL LAND OFFICE,
*Washington, D. C., August* 18, 1883.

*Statement of the several amounts paid to the State of Iowa on account of* 5 *per cent. of the net proceeds of sales of land in said State from December* 28, 1846, *to date of last adjustment, April* 4, 1874.

| Date of account. | For what period. | Amount accruing to States. |
|---|---|---|
| August 25, 1848 | From December 28, 1846, to December 31, 1847 | $16,422 05 |
| May 15, 1849 | From January 1, 1848, to December 31, 1848 | 9,105 52 |
| June 6, 1850 | During year 1849 | 5,697 46 |
| June 18, 1851 | During year 1850 | 6,464 36 |
| October 20, 1852 | During year 1851 | 11,901 90 |
| March 13, 1854 | During year 1852 | 1,697 68 |
| October 18, 1854 | During year 1853 | 54,441 59 |
| June 13, 1855 | During year 1854 | 226,873 86 |
| August 27, 1856 | During year 1855 | 185,785 32 |
| July 18, 1857 | During year 1856 | 34,219 34 |
| July 17, 1858 | During year 1857 | 28,101 41 |
| | | [580,710 49] |
| October 2, 1860 | During year 1858 and 1859 | 4,189 95 |
| October 30, 1869 | From January 1, 1860, to June 30, 1869 | 19,707 28 |
| December 8, 1870 | From July 1, 1869, to June 30, 1870 | 11,489 78 |
| July 17, 1871 | From July 1, 1869, to December 31, 1870 | 3,760 38 |
| April 13, 1872 | During year 1871 | 3,212 99 |
| April 22, 1873 | During year 1872 | 2,248 97 |
| April 4, 1874 | During year 1873 | 755 32 |
| Total amount paid | | 626,075 16 |

## EXHIBIT C.

GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 18, 1883.

*Locations of military bounty land-warrants in the States of Iowa and Illinois, under the acts of* 1847, 1850, 1852, *and* 1855, *for the years* 1853, 1854, *and* 1855.

| State. | 1853. | 1854. | 1855. |
|---|---|---|---|
| | *Acres.* | *Acres.* | *Acres.* |
| Iowa | 1,072,798.31 | 748,073.82 | 2,318,659.16 |
| Illinois | 1,788,822.45 | 462,731.67 | 65,799.19 |

O

4 orig

# In the Supreme Court of the United States.

In its Original Jurisdiction.—October Term, 1882.

THE STATE OF ILLINOIS, *on the relation of* JOHN M. HAMILTON, *its Governor, the Petitioner,*

*vs.*

NOAH C. MCFARLAND, *Commissioner of the General Land Office, the Respondent.*

## Amended Petition in Mandamus.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, in session 1882, at the city of Washington, in the District of Columbia:*

The petition and relation of the State of Illinois, by John M. Hamilton, its Governor, humbly showeth that, by the act of Congress passed and approved April 18th, 1818, for the admission of said State into the Union, found at page 428, vol. 3, of the Statutes at Large, it was stipulated, in the 3d clause of Section 6 of said act, that the Government of the United States would pay to said State 5 per cent. upon the sales of the public lands in said State.

That in consideration of the 5 per cent., so reserved and agreed to be paid, it was stipulated, in the 4th clause of the said 6th Section of the act of Congress aforesaid, among other things—

1st. That the four foregoing propositions herein offered are on the conditions that the convention of said State shall provide, by an ordinance irrevocable without the consent of

the United States, that every and each tract of land sold by the United States from and after the 1st day of January, 1819, shall be exempt from any tax laid by order or under any authority of the State, whether for State, county or township, or any other purpose whatever, for the term of five years from and after the day of sale.

2d. That lands granted for military services in the war of 1812, that may be located therein, should not be taxed by said State for either State, county or township, or any other purpose whatever, while held by the patentees or their heirs, for a period of three years from and after the date of their patents respectively.

3d. That the lands of non-resident proprietors should not be taxed more than the lands of residents.

And your petitioner avers that said State did, by ordinance of its convention duly adopted, accept of all of the stipulations and conditions contained in 4th clause of the 6th Section of said act of Congress; and that said State has, at all times, faithfully kept and performed each and every of the said stipulations and conditions, especially the two conditions aforesaid.

Your petitioner would further make known to this Honorable Court that, under the provisions of an act of Congress entitled "An act to settle certain accounts between the United States and the State of Mississippi and other States," approved March 3d, 1857, (Statutes at Large, vol. 11, p. 200), it is the duty of the Commissioner of the General Land Office, when required so to do, to state an account between the United States and the said State of Illinois upon the same *principles and allowance* as prescribed in the "act to settle certain accounts between the United States and the State of Alabama," approved March 2d, 1855, (Stat. at Large, vol. 10, p. 630.) And your petitioner avers that the *principles and allowance*, as prescribed by said last-named act, requires, and makes it the duty of the Commissioner of

the General Land Office, upon proper application therefor, to state an account between the United States and the said State of Illinois for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, under the act of April 18th, 1818, for the admission of said State into the Union, on account of lands lying within said State, disposed of by the United States for, or in the satisfaction and redemption of, military land warrants issued by the United States for military services. And in this connection your petitioner would state that, prior to the dates of the passage of said acts of 1855 and 1857 respectively, the 5 per cent. on the cash sales of the public lands lying within said States of Alabama and Mississippi had been regularly and periodically paid to said States respectively, so that at the dates of the passage of said last-named acts there were no unsettled accounts growing out of the 5 per cent. clause of the acts for the admission of the States of Alabama and Mississippi respectively into the Union, except for lands entered and purchased with military land warrants.

Your petitioner would further make known to this Honorable Court that the Government of the United States, in disposing of the public lands by sale in this and other Western States, adopted two methods: one for cash, the other for the redemption of her outstanding military warrants or obligations, calling for a specific quantity of land issued to the soldiers that had enlisted and served in the different wars of the country, under certain statutory provisions of law enacted in advance of their enlistments, and as compensation for their services chiefly in the three great wars of the country, namely: the Revolutionary war, the War of 1812, and the Mexican war, and in several of our Indian wars.

And in this connection your petitioner would state that by the Act of Congress of August 14th, 1848, (9 Stat., 332), military land warrants were made receivable at the rate of $1.25 per acre for the number of acres therein contained, in

payment for any of the public lands subject to private entry; and that by the act of March 22d, 1852, (10 Stat. p. 3), all military land warrants theretofore, and thereafter, issued were made assignable by the persons to whom they were issued, and also made receivable from such assignee at the rate aforesaid per acre in payment for any of the public lands located and taken up under the pre-emption laws of the United States.

Your petitioner would further make known to this Honorable Court that heretofore the 5 per cent., at stated and proper periods, has been allowed and paid to the said State on cash sales, but that on lands located and purchased with military warrants, the said 5 per cent. has been persistently and unlawfully withheld from the State. That, as shown by the annual report of the Commissioner of the General Land Office, made in the year 1871, there had been taken up and purchased with land warrants in the State of Illinois, 9,533,653 acres of land, on which the 5 per cent., at a value of $1.25 per acre, would amount to $595,853.31, being the sum, more or less, that is now due to the said State, but which the Government, by its officers, refuses to pay, although demand therefore was made of the Hon. Noah C. McFarland, Commissioner of the General Land Office at Washington, D. C., on the *10th* day of *April*, 1883, in writting by W. W. Wilshire, the agent and attorney of the relator.

In said demand the Commissioner, aforesaid, was requested to state an account between the United States and the State of Illinois, for the purpose of ascertaining what sum or sums of money is due said State, heretofore unsettled under the 5 per cent. clause of the sixth section of the act of Congress passed and approved April 18, 1818, for the admission of the State of Illinois into the Union, found on page 428, vol. 3, of the Statutes at Large, and that he transmit said account, so audited and stated with the proper pa-

pers, vouchers and certificates, to the First Comptroller of the Treasury for his inspection and action, referring him, for his authority and duty to do so, to the acts of Congress hereinafter more particularly described. Nevertheless, the commissioner aforesaid refused to state said account aforesaid, and still does refuse, to the great damage and injury of said State of Illinois; notwithstanding the claim itself set up by said State is a legal and just claim, and that she is legally entitled to have the aforesaid account stated to the end that said claim may be finally awarded and paid to her.

Your relator further suggests and makes known to this Honorable Court that the duty of the commissioner, aforesaid, to state such an account between the Government and the State of Illinois for the purpose of ascertaining what sum or amount of money is due said State, heretofore unsettled, under the 5 per cent. clause of the sixth section of the act passed and approved April 18, 1818, for the admission of the said State into the Union, is purely ministerial and mandatory in its character, leaving no room for the exercise of his judgment and discretion in the performance of the same. The said acts or statutes so prescribing his duties in the premises are found in section 456 of the Revised Statutes, and especially in the acts of Congress passed and approved respectively, March 2, 1855, and March 3, 1857, entitled as aforesaid.

And your relator further makes known to this Honorable Court here, that said State is entirely without remedy in the premises, unless the same be afforded by the power and interposition of this court in granting its writ of mandamus. And your relator therefore prays that a writ of mandamus may issue out of this Honorable Court, directed to the said Noah C. McFarland, Commissioner of the General Land Office, aforesaid, commanding him to state an account between the United States and the State of Illinois in the manner

and for the purpose herein above stated and prescribed, in order that the account so stated may be transmitted to the First Comptroller of the Treasury for his examination and action to the end, that the same may be allowed and paid by the United States to your relator; and that this Honorable Court may make such other and further order in the premises as the case may require, and as to right and justice may appear.

By the Governor,

JOHN M. HAMILTON.

W. W. WILSHIRE,
*Att'y for Relator.*

DISTRICT OF COLUMBIA.

William W. Wilshire, agent of the relator, &c., on oath, states that the statements made in the foregoing petition of his own knowledge are true, and those made on information he believes to be true.

W. W. WILSHIRE.

Sworn and subscribed to before me this 24th day of September, A. D. 1883.

[SEAL.] JOHN E. BEALL,
*Notary Public.*

---

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C.

With the approval of the court I hereby consent that the within and foregoing amended petition may be filed to take the place of the original petition, and that the rule heretofore issued in said cause may be amended accordingly.

S. F. PHILIPS,
*S. Gen'l, &c.*

*September 28th, 1883.*

4 orig

4 orig

# In the Supreme Court of the United States.

OCTOBER TERM, 1883.

---

The answer of Noah C. McFarland, Commissioner of the General Land Office, to the rule in the case of a petition by the State of Illinois asking for a mandamus against this respondent in respect of a certain claim for 3 per cent. of the net proceeds of public lands disposed of by the United States to the holders of bounty land warrants.

This respondent admits that upon the state of facts set forth in such petition as the same are modified and explained by those that are hereinafter set forth, he has refused to state an account between the United States and the State of Illinois of the matters in such petition mentioned, and for cause of such refusal he saith:

1. That neither the act of 1818 for the admission of the State of Illinois into the Union nor those of 1855 and 1857, mentioned in said petition, authorize that State to claim a percentage upon such of the public lands within its boundary as have been disposed of by the United States to holders of bounty land warrants; and,

2. That if the original meaning of these acts were otherwise, still contemporaneous construction thereof by the

General Land Office and the State of Illinois in numerous and important transactions, each of which suggested the raising of a question as to such construction, if it existed, have established the meaning first-above suggested, as between the State and the respondent, and such meaning has at no time been questioned in business transactions between such parties, until the commencement of this action.

In general connection with the above-stated matters this respondent refers to Exhibit A, filed as part of his answer to the like petition of the State of Iowa, which is to be heard together with the present.

He also shows that, beginning with November 8, 1830, and ending upon September 28, 1863, thirty-three different settlements have been made in the General Land Office with the State of Illinois, for the percentage due to the latter under the act of its admission as a State, which settlements occurred at reasonably regular intervals, and covered in all the sum of $711,744.82, as will appear by reference to Exhibit A of this answer; and that in none of these, as this respondent is informed and believes, was the present claim suggested, although during some fifteen or more years of the same period large amounts of the public lands lying within that State were disposed of by the United States from time to time to holders of land warrants; for example (as will appear by Exhibit C to the answer to the like petition of the State of Iowa), in the years 1853, 1854, and 1855, 1,788,822.45 acres;

462,731.67 acres, and 65,799.19 acres respectively having been so disposed of.

*This respondent thereupon submits that either the State of Illinois has no right to the percentage now claimed, or, at all events, what has heretofore passed as above in reference thereto exempt the action of this respondent from control in this matter by writ of mandamus.*

Wherefore he prays that he may be hence dismissed, &c.

S. F. PHILLIPS,
*Solicitor General, for the Commissioner.*

DISTRICT OF COLUMBIA,
*Washington City:*

Noah C. McFarland, the defendant above named, maketh oath that the several matters and things in the foregoing answer stated are true in substance and in matter of fact, to the best of his knowledge, information, and belief.

N. C. McFARLAND,

Signed in my presence and sworn to before me this August 30, 1863.

GEO. M. LOCKWOOD,
*Notary, &c.*

EXHIBIT A.

GENERAL LAND OFFICE, *August* 18, 1883.

*Statement of the several amounts paid to the State of Illinois on account of 3 per cent. of the net proceeds of sales of land in said State from January* 1, 1819, *to date of last adjustment of account, Sept.* 28, 1863.

| Date of payment. | For what period. | Amount accruing to States. |
|---|---|---|
| November 8, 1830 | From January 1, 1819, to June 30, 1830 | $19, 576 22 |
| April 25, 1831 | From July 1, 1830, to December 31, 1830 | 7, 067 04 |
| February 18, 1832 | From January 1, 1831, to June 30, 1831 | 5, 594 55 |
| December 5, 1853 | From July 1, 1831, to December 31, 1831 | 6, 782 17 |
| December 6, 1833 | From January 1, 1832, to June 30, 1832 | 3, 056 57 |
| July 26, 1834 | From July 1, 1832, to December 31, 1832 | 5, 633 04 |
| July 28, 1834 | From January 1, 1833, to June 30, 1833 | 6, 706 38 |
| September —, 1834 | From July 1, 1833, to December 31, 1833 | 6, 243 48 |
| June 3, 1836 | From January 1, 1834, to June 30, 1834 | 5, 921 55 |
| June 4, 1836 | From July 1, 1834, to December 31, 1834 | 6, 662 63 |
| May 5, 1840 | From January 1, 1835, to December 31, 1839 | 303, 589 37 |
| October 25, 1841 | From January 1, 1840, to March 3, 1841 | 17, 462 93 |
| November 8, 1842 | From March 4, 1841, to June 30, 1842 | 19, 805 46 |
| January 13, 1844 | From July 1, 1842, to June 30, 1843 | 10, 773 14 |
| June 29, 1844 | From July 1, 1843, to December 31, 1843 | 7, 645 17 |
| April 30, 1845 | From January 1, 1844, to June 30, 1844 | 7, 266 02 |
| June 30, 1845 | From July 1, 1844, to December 31, 1844 | 10, 176 26 |
| October 30, 1846 | From January 1, 1845, to December 31, 1845 | 38, 577 48 |
| July 15, 1847 | From January 1, 1846, to December 31, 1846 | 16, 692 20 |
| February 27, 1849 | From January 1, 1847, to December 31, 1847 | 18, 113 50 |
| April 30, 1849 | From January 1, 1848, to December 31, 1848 | 10, 449 94 |
| May 18, 1850 | From January 1, 1849, to December 31, 1849 | 9, 009 66 |
| May 2, 1851 | From January 1, 1850, to December 31, 1850 | 8, 681 86 |
| May 7, 1852 | From January 1, 1851, to December 31, 1851 | 11, 833 25 |
| March 10, 1854 | From January 1, 1852, to December 31, 1852 | 13, 925 76 |
| May 23, 1854 | From January 1, 1853, to December 31, 1853 | 35, 325 95 |
| June 29, 1855 | From January 1, 1854, to December 31, 1854 | 46, 219 86 |
| July —, 1856 | From January 1, 1855, to December 31, 1855 | 27, 007 90 |
| July 27, 1857 | From January 1, 1856, to December 31, 1856 | 13, 791 69 |
| March 12, 1860 | From January 1, 1857, to December 31, 1859 | 3, 927 12 |
| April 5, 1861 | From January 1, 1860, to December 31, 1860 | 293 75 |
| September 28, 1863 | Indian reservation | 1, 565 80 |
| April 4, 1859 | See statement "A" | 6, 978 12 |
| Total amount | paid | 711, 744 82 |

IN THE

# SUPREME COURT OF THE UNITED STATES

In its original jurisdiction.—October Term, 1882.

| | |
|---|---|
| THE STATE OF IOWA, *on the relation of* BUREN R. SHERMAN, *its Governor*, *vs.* NOAH C. McFARLAND, *Commissioner of General Land Office.* | *Petition in Mandamus.* |
| THE STATE OF ILLINOIS, *On the relation of* JOHN M. HAMILTON, *its Governor*, *vs.* NOAH C. McFARLAND, *Commissioner of General Land Office.* | *Petition in Mandamus.* |

## BRIEF OF

## R. P. LOWE AND W. W. WILSHIRE,

FOR THE RELATORS.

WASHINGTON, D. C.:
R. O. POLKINHORN, PRINTER,
1883.

IN THE

# SUPREME COURT OF THE UNITED STATES

In its original jurisdiction.—October Term, 1882.

| | |
|---|---|
| THE STATE OF IOWA, *on the relation of* BUREN R. SHERMAN, *its Governor*, *vs.* NOAH C. McFARLAND, *Commissioner of General Land Office.* | *Petition in Mandamus.* |
| THE STATE OF ILLINOIS, *On the relation of its Governor*, *vs.* NOAH C. McFARLAND, *Commissioner of General Land Office.* | *Petition in Mandamus.* |

## Brief of R. P. Lowe and W. W. Wilshire, for the Relators.

The applications of the States of Iowa and Illinois for writs of mandamus against the defendant in the above entitled causes, are identical in purpose, and, standing substantially on the same grounds for allowance, may, with propriety, be presented jointly for hearing and determination.

These applications raise two general questions: First, whether the claims thus set up by said States are legally entitled to recognition and payment; if so, then secondly,

whether the order for making effectual said writs, can properly be granted under the facts of the case disclosed therein, and the principles of law and rules of practice governing the same.

As touching the first proposition it is proper to say that the Government of the United States in receiving the Western States into the Union, stipulated in their several acts of admission to pay them five per centum upon the sales of the public lands situated therein. The consideration for the 5 per cent. so reserved, is substantially the same in each of the enabling acts of said States.

The particulars in which they vary do not change the principle upon which the present claim is based—that is to say, Ohio and Indiana stipulate that the public lands therein situate shall remain exempt from all taxation whatever for the term of five years from date of sale. Iowa, in her act of admission, stipulates four things: 1st. That she will not interfere with the primary disposal of the soil; 2d. Not to tax for any purpose the public land; 3d. That the non-resident proprietors shall not be taxed more than the resident; and, 4th. That lands granted for military services in the war of 1812, that may be located therein, shall not be taxed for three years from date of patent. Illinois same as Ohio and the 3d and 4th stipulations of the Iowa compact. Missouri same as Ohio and including that of Iowa. The other enabling acts need not be referred to in the present hearing. In the appendix to this brief will be found, for convenient reference, the clause in the several acts admitting the five States above named, which contain the stipulation for the payment of the per cent. in question, designated by the letters A, B, C, D, E.

It can be safely affirmed that the stipulations in the compact, on the part of the new States, have been faithfully observed and carried out. And it is also conceded that the General Government has, with equal fidelity, paid the five per

cent. upon the cash sales of the public lands situated therein. It may be proper, however, to qualify this last statement as to three of the States specified, namely, Ohio, Indiana, and Illinois, which claim to have an unsettled account against the Government for two of the five per cent. on the cash sales of the public lands. The grounds upon which this two per cent. claim rests are not unfamiliar to this court, as it has really been the subject of much discussion both in and out of Congress. Wherefore more need not be said about it in this paper, especially as it has but little connection with, and is quite distinct from, the claims made against the Government, in respect to another class of land entries or locations, which have absorbed a heavy per cent. of the public lands in some of the new States, including those now before the court. We refer to the lands located and paid for with military warrants, which the Land Department of the Government has hitherto declined to allow the five per cent., upon the mistaken notion that they were bounties and not sales.

This, we propose to show, is a misapprehension, as it touches the great body of military entries in the western and southwestern States, for they were made of lands for military services granted by Congress at a time and under circumstances which clearly show that they possessed the essential elements of a contract between the Government and the soldiers, thereby making them, in a legal sense and in the meaning of the compact, *sales*.

In the appendix to this statement will be found extracts from the several acts of Congress, granting lands for military and naval services in the three great wars of this country, namely: The Revolutionary war, the war of 1812, and the Mexican war.

By a reference thereto, it will be seen, as they reveal the fact, that they are wholly prospective in their operation, offering in advance a given quantity of land to the officers

and soldiers who should be appointed and recruited in the regular or enlisted in the volunteer service.

Note the dates of these several grants, as stated and published in the appendix hereto.

It will be seen, by an inspection thereof, that those passed by Congress for the benefit of the recruiting service at the opening of the Revolutionary war are dated in August and September, 1776. (See Appendix F.)

The Commonwealth of Virginia, about the same time, (October, 1776,) for the purpose of raising her quota of men, and meeting the exigencies of the coming war, also offered lands to her soldiers as part compensation for their military services. (Appendix G.)

These lands, offered by the Legislature of Virginia, were afterwards patented by Congress, to her soldiers, agreeable to the terms of session made by Virginia to the Federal Government of the Northwestern Territory, March 1, 1784. (Appendix H.)

The several military grants for the War of 1812, are dated December 24th, 1811; January 11th, 1812; February 6th, 1812; December 12th, 1812; January 24th, 1814; December 14th, 1814. (Appendix I.)

Those of the Mexican war, are dated February 11th, 1847; March 3d, 1847; September 28th, 1848. (Appendix K.)

It is quite obvious, from the dates and language of these grants, that they were designed to effect a future object, and in no sense did they relate to a past subject. The time when, and the circumstances under which, they were passed, indicate but too clearly the purpose which Congress had in view, namely, to facilitate and encourage enlistments, that the requisite numerical force of the Army might be enlarged as rapidly as possibly in order to meet the supposed coming exigencies of each of the impending wars.

The first enquiry presenting itself under these grants is, whether the lands so offered were simply gratuities, or were based upon a consideration moving from the Government to the soldier in the three great wars of the country. We say that the popular idea that these military-grants were bounties, does not change the nature of the transactions which were their own best expositors, nor can it alter the rights of the parties to a solemn contract; but that these offers of land were a part of a stipulated compensation, provided for by law under which the enlistments were made, and just as fully entering into the contract between the soldier and the Government as his monthly pay. The term *bounty*, as applied to this kind of reward for military services, is apt to be misleading. It is not used in its popular sense as imparting a gratuity, but in the technical sense of a gross sum or quantity, given in addition to the monthly stipend, but given, like the latter, in consideration of, and as payment for, services to be rendered. Thus, in the late war of the rebellion, in order to stimulate enlistment, a pecuniary bounty, that is, a gross sum in addition to the monthly pay, was offered by the Government to all who should enlist in the service; and in numerous instances further bounties of the same kind were offered and paid by counties and cities in order to induce enlistments to fill up their respective quotas of men; such offers when accepted and acted upon so completely constituted contracts with the parties entering under them, that in repeated instances, as the writer of this paper is informed, fulfillment thereof has been enforced by the Courts—we refer to one case. *Keough* vs. *Scott County*, 28 Iowa, R. 337.

It is clear that pecuniary 'bounties,' as they were designated by which enlistments were so largely procured during the late rebeliion, occupy the same attitude as respects the question now under consideration, as the so-called bounty land warrants do.

Both really were simply extra allowances offered for the same purpose, and when accepted and enlistments made thereunder, they became "*ipso facto*" contracts which we suppose any Court would recognize and enforce. In this way the public lands were made available as a resource for defraying the national burdens just as effectually as if they had been converted into money, and the money used in paying the enlisted men.

We close our remarks on this point by referring to the grant of lands made to the soldiers of the Mexican war. (Appendix K.) This grant does not purport to be a bounty act upon its face, and as a matter of fact is not—special attention is called thereto—also, by referring to the opinion of General Washington to a similar law.

The Continental Congress, towards the close of the Revolutionary war, passed a resolution to the effect that the officers and soldiers engaged in the same should have half-pay for life, on account of their great sufferings, sacrifices and services rendered and endured in aiding to erect this stupendous fabric of freedom and empire, on the broad bases of independency and human rights; which was afterwards changed to five years full pay in money or securities, &c., if they continued to the end of the war. Subsequently, a report obtained in the army that Congress did not mean to comply with this pledge, which produced much uneasiness.

In reference thereto, General Washington, in a circular letter addressed to the Governors of the States, among other things, held this language:

> "I think it unnecessary to say anything more than just to observe that the resolutions of Congress now alluded to are as undoubtedly and absolutely binding on the United States as the most solemn acts of confederation or legislation. As to the idea, which I am informed has in some instances prevailed, that the half-

pay and commutation are to be regarded merely in the odious light of a pension, it ought to be exploded forever. That provision should be viewed as it really was, a reasonable compensation offered by Congress, at a time when they had nothing else to give, to officers of the army for services then to be performed; it was the only means to prevent a total dereliction of the services. It was a part of their hire. I may be allowed to say it was the price of their blood and of your independence. It is, therefore, more than a common debt. It is a debt of honor, it can never be considered as a pension or gratuity, nor cancelled till it is fairly discharged."

[Thatcher's American Revolution]

Having thus shown that the military land-warrants were not issued and delivered to the soldier as a mere gratuity, but that they were based upon a perfectly good and adequate consideration, we proceed next to show that the five per cent. reserved for the new States, was also founded upon a like good and valuable consideration of no ordinary character.

By recurring to the stipulations contained in the several acts admitting the Western States into the Union, it will be seen that very great advantages were secured to the United States as proprietor of the lands as well as their grantees, a large per cent. of whom were non-residents. For, by the concession not to tax the Public Lands—not to tax the lands of private purchasers for five years after date of entry in some, even, of the States, namely, Ohio, Indiana, Illinois, Missouri, Alabama, Mississippi and Louisana, and not to tax a certain class of entries for three years after date of entry—an amount of revenue has been surrendered by the States, greatly in excess of the five per cent. now due the same. We give an approximate estimate of the revenue so surrendered by the State of Illinios, as furnished by one of its officers, as an example. (Appendix L.)

As touching the limitation on the power of taxation over the Public Lands within the jurisdiction of a given State, the suggestion that the State would not have the right to do so, even in the absence of any stipulation to the contrary, merits, we think, but little weight.

This immunity, thus contracted for between the two governments, implies the power as an incident to the sovereignity of the State, which has not been abridged only to the extent of the powers granted to the General Government under the Federal Constitution.

The taxing power was not thus parted with, and it inheres in the sovereign power of a State, and extends itself over all subjects and descriptions of property within its legitimate jurisdiction, excepting, of course, the Public Works, such as Light Houses, Fortifications, Arsinals, Dock-Yards, and such other public agencies as may be necessary to carry on the proper functions of the Government.

The public lands do not fall within this rule; and as they are enhanced and made saleable by the improvements and enterprises of the State, so they should, on principle, be taxed by the State within whose jurisdiction they may be situated, unless they are exempted by compact between the two governments, as in the case before us.

For a further discussion of this question see the late Senator Sumner's speeches, edition of 1856, pages 24–30, where he defends the exercise of this right by a State, and places the question upon grounds so logical that it is not known that it has ever been controverted.

This limitation, therefore, upon the taxing power of the State in the particulars specified, conferred upon the general Government a substantial right, in consideration of which the State was to receive a definite proportion of the avails of the public lands, being, as it is termed in the compact, five per cent. on the sales thereof. It could not have been in

contemplation that Congress might effectually defeat the right of the States to the five per cent. on sales, by adopting a policy of disposing of the lands for value, to be received by the Government in some other form than money.

But the stipulation, in the several acts admitting these States into the Union, calls for the payment of five per cent. on the sales of the public lands. What is the fair and reasonable interpretation of these words, and what kind or mode of disposition of such lands ought to be regarded a "*sale*" within the meaning of said acts?

To constitute a case of sale, is it necessary that the price should be paid directly in money at so much per acre? or is it not equally a sale for the purposes of these acts, when the Government, instead of converting the lands into money and applying the proceeds to the payment of its debts, or to meeting the expenses of the public service, makes the lands themselves directly available to these ends, by conveying them in kind to public creditors, or contracting in advance with persons whom it takes into the public service (military or civil) to give them land, or obligations, or warrants payable in land, as payment in whole or part for their services? It is submitted that in either case the transaction is a sale; that it does not essentially alter the character of the transaction, whether the government gets an equivalent for the public lands, of which it disposes, in money or in money's worth, that is, in the rendition of public service beneficial to the nation, and which would otherwise have to be paid in money.

It is true that, ordinarily, to constitute a sale the price must be paid in money, or its negotiable representative as bills of exchange, promisory notes, &c.,—military warrants, altho' payable in land, have a negotiable quality, as well as a quotable money value in the market as other securities, and not only had a fixed statutory value of $1.25 per acre, but were authorized by the acts of Congress to be received in pay-

ment at that value for the purchase of land. See Statutes at Large, vol. 9, p. 332, an act in relation to military land warrants, passed in 1848, which reads as follows:

> "That any non-commissioned officer, musician or private, or his widow or heirs, who shall receive and hold in his own right a land warrant, issued by the Government of the United States for military services, may locate the same in legal sub-division on any public land, subject to private entry using the warrant at $1.25 per acre for the number of acres therein contained, and paying the balance, if any, in money, but no claim shall exist on the government to pay for any balance on said warrant in money."

Also, vol. 10, p. 3, passed March, 1852, the first section of which has this provision:

> "Provided, That any person entitled to pre-emption right to any land shall be entitled to use any such land warrant in payment of the same at the rate of $1.25 per acre for the quantity of land therein specified."

In 1856, a few years after the passage of this act, the Secretary of the Interior, then the Hon. Robert McClelland, in a letter to the Commissioner of the Land Office referring to this law, said, among other things, that it was merely designed to declare that military bounty land warrants, and all legal and valid locations thereof, then authorized by law, should be assignable, and that the proviso in said law in relation to pre-emptions authorizing a pre-emptor to make use of said warrants owned by him, in payment for his pre-emption at the rate of $1.25 per acre, &c., was intended only to make such land warrant in his hands equivalent to so much cash, and not to make it technically a location, &c.

Mr. McClelland evidently understood that Congress intended by said act, that in the location and payment of lands by these military warrants, they were intended to be treated and used as so much money, and when they did so it was a

purchase on the one hand and a sale on the other. These being correlative terms, a purchase cannot transpire without a sale taking place.

This view of the law derives much support from the fact that the same act authorizes the Registers and Receivers of the local land offices to charge for their services in locating said warrants issued since the 11th day of February, 1847, the same per centage to which they are entitled by law for sales of the Public lands for cash.

In the enabling acts of some of the States, the stipulation is to pay five per cent. on the net proceeds of the sales of the public lands. The words *net proceeds* means five per cent. less the expenses of survey. It is objected that these words imply only cash sales, and not a purchase with a land warrant, for the reason, upon an entry by the latter, the net proceeds could not be estimated. Those making this objection seem uninformed as to how this business is transacted in the departments of the Government. To explain: A certain quantity of land is sold for cash at the minimum price, the aggregate amount being ascertained at that figure, there is deducted therefrom the expenses of survey—the data of computing which is found in the Land Department, perhaps with the returns of surveys. This done, the account for the five per cent. on the residue is stated, which is the net proceeds, and the same is paid out of the Treasury from the general revenue. Now, suppose a like quantity of land is paid for with land warrants of a statutory value fixed at $1.25 per acre. The aggregate value and amount thereof, as well as the expenses of survey, can be readily ascertained as in the other case. After deducting the expenses, the remainder will be the net proceeds, and the five per cent. will be paid the same as on cash sales. Really, as a matter of fact, there is no more difficulty in estimating the net proceeds in the one case than in the other.

Thus far we have viewed the matter as a transaction between the United States and the soldier, in consideration of whose services the warrants were issued on grants of land made as an inducement to the engagement, and which formed as much a part of the contract of enlistment as did the monthly pay.

It follows, therefore, that these grants of land for military services in the three great wars of this country are essentially in the nature of contracts, and as such become the foundation of the claim which the Western States now make for the five per cent. thereon, according to the terms of the compact contained in their acts of admission, for if they have the elements of a contract, it follows that the lands located thereunder are *sales* in the sense of the law, and not bounties. It involves no other or different principle than, if one man should say to another work for me twelve months and I will pay you at the rate of $10 per month and eighty acres of land for such service. Could he in law discharge his obligation by making the money payment and withholding the land upon the shallow pretext of a bounty to be paid or not at his own pleasure?

But the character of this mode of disposing of lands by the United States as constituting a *sale* is put in a still stronger light when it is looked at as a transaction between the government and the actual holder of the warrant.

Instead of patenting specific land to the soldier entitled thereto, in virtue of his military services, the government issued to him its written obligation, payable in the agreed quantity of land, to be selected by him from the whole body of lands open to sale and entry throughout the country. These obligations or warrants were made assignable by law, and subject to sale and transfer in the market from hand to hand by mere delivery. In this way they became practically a species of government scrip or currency, and persons desirous of becoming land proprietors could and

did go into the market, and purchase the same, and with it buy the land they wanted, and in this way large quantities of the public lands were disposed of, where ever the same was subject to sale and entry at the difierent land offices. And although they were treated as purchasers and the lands so bought by them were exempt from taxation for five years in the first seven States admitted as aforesaid, yet the five per cent. on their sales, which was the consideration of the exemption, has been strangely and steadily withheld.

It is conceded that lands purchased and located with land warrants were exempt from the five year taxation under the compact; should not the right to the five per cent. thereon be as broad as the exemption, and attach to and cover the same land? Certainly, without doubt.

Now, it is asked, if it is not contrary to reason and common sense to say that these lands were not sold, because the Government received in payment for them, instead of cash, its own obligations, payable in land? Can it be considered less a case of sale that the purchaser, instead of paying for his land in greenbacks, did so with the Government's own paper obligations? The chief difference in the two descriptions of paper is that the first is available for purchasing all commodities indiscriminately, including lands, whilst the latter is limited to the purchase of lands only.

Suppose the United States had issued pecuniary obligations—*i. e.*, bonds payable to bearer at a future day, or payable like greenbacks whenever the Government should find itself able, but with the proviso that they should be receivable at par in payment for public lands, how would the case of lands paid for with such bonds differ from the present case? The bonds might have been issued like land warrants, for military services, or for any other consideration or for no consideration. They might have been regarded by Congress strictly as a gratuity to parties thought

to have, for any reason, deserved well of their country. This would not affect the question whether lands entered and paid for with such bonds ought to be considered as sold.

In either case the Government would have received for thus disposing of its lands, its own valid outstanding obligations for the fulfilment of which its faith was plighted, and the surrender of which by the holder would constitute an ample consideration, legal and equitable, for the certificate of purchase. These considerations apply to the fullest extent to the case of entries of land by means of land warrants.

In this aspect of the case it becomes immaterial whether the original issue of the warrants was for a valuable consideration and in pursuance of contract, or was strictly a gratuity. In either case the transaction between the Government and the locator of the warrant is the same. A party holding a Government obligation payable in land surrenders it, and in consideration of such surrender receives a certificate which entitles him to a patent for a specific tract of land. It is immaterial to the character of this transaction for what consideration such obligation was originally issued. Its legal capability of assignment has practically imparted to the land warrant a negotiable quality. It has become a part of the general mass of securities passing from hand to hand in the market. The purchaser buys relying on the faith of the United States for the fulfilment of the agreement which it embodies, and without inquiry as to the consideration in which it originated.

Now, a little reflection will satisfy any one that the true solution of the question, whether lands entered by the location of warrants sold by the government, is to be found, in the nature of the transaction, at the time of the location of the warrant, not in that of its issue. No land is either sold or disposed of in any way by the mere issue of the warrant.

That gives the warrantee no title or claim, legal or equitable, to any specific land. It is a mere executory contract or promise calling for a given quantity of land somewhere out of the whole vast public domain. It is not until the specific tract is ascertained, and the land warrant is exchanged for a certificate of location, which is to ripen into a patent for the specific land therein described, that any land can be said to have been disposed of or parted with by the government, and that this transaction between the United States and the locator of the warrant is, to all intents and purposes, a sale of the land, seems altogether clear.

The further discussion of the question, whether lands entered with military land warrants, under the circumstances and in the manner prescribed by the acts of Congress, are not sales in the sense of the law, would seem to be needless. We claim that the enabling acts referred to embody all the elements of a legal and binding contract between the several States and the National Government, which both parties are entitled to have carried into effect in the same manner and on the same principles as contracts between individuals are enforced; such performance is not a matter of grace, but strict right. Chancellor Kent lays it down—

> "That a law embodying a contract, duly passed and promulgated, thenceforward becomes the law of the land, and that it is as binding upon Congress as upon the people, or any other branch of the government, or as a contract would be binding upon the government executed under the authority of law."

Referring now to the other important questions raised by these applications, namely, whether writs of mandamus will lie, and ought to be made effectual under the facts of the case herein described, and the principles of law governing the same. On this point we may assume, at the outset, that the jurisdiction of this Court over the writ as against an officer of the government is settled and no longer open for

forensic discussion; the last decision being the case of *Schurs* vs. *United States*, 102 U. S. R., p. 378.

Again, we suggest, for the consideration of the court, that all the conditions required by the principles and usages of law, in a proceeding of this kind, are met by the facts in this case, unless, possibly, it should be one—that is to say, a demand for the performance of the duty which we are seeking by this process to have performed, has been made upon the proper officer, and his refusal to comply therewith is distinctly alleged and shown—that the relator is entirely without any specific remedy, except by this proceeding.

Now, the point of difficulty, above referred to, has relation to the nature of the duty which the Commissioner is called upon to execute, whether it is simply ministerial, or whether it is one which the officer may or may not perform according to his judgment and discretion.

We suppose the general rule established by this court is that the writ will be granted only when the act required to be done is clearly imposed by law, outside of the discretion of the officer, who is, in such case, but the minister of the law, and the relator is without any other adequate and legal remedy.

*Schurs* vs. *U. S.*, 102 U. S. R. P., 378;
*Kendall* vs. *U. S.*, 12 Pet., 554;
*Commonwealth of Kentucky* vs. *Boutwell*, 12 Wall., 526,
*Marbury* vs. *Madison*, 1st Crouch.

If the court will adhere to this rule, only in substance stated, it is believed that its jurisdiction to award the writ in this case will become quite apparent upon a due examination of the nature of the act to be done and the positive requirement of the law to perform it.

Now there are two separate and distinct acts of Con-

gress, which authorize and require the Commissioner of the Land Office to audit and settle all public accounts relative to the public lands. The first was passed the 25th of April, 1812, and was carried into the Revised Statutes and embodied in section 456, and reads as follows:

> "Sec. 456. All returns relative to the public lands shall be made to the Commissioner of the General Land Office, and he shall have power to audit and settle all public accounts relative to the public lands, and upon the settlement of any such account he shall certify the balance, and transmit the account with the vouchers and certificates to the First Comptroller of the Treasury for his examination and decision thereon."

It will be observed that this act not only conveys the power to do so, but in its purpose and object requires it as a duty that the Commissioner shall audit and settle, not some, or a part, but all public accounts relative to the Public lands. In discharging this duty the act does not limit or qualify in any way the performance thereof, such as that the Commissioner may or may not do so according to his discretion, or, that he is to audit and settle a certain class of public accounts to the exclusion of others, but it clearly imposes, as an unqualified duty, to state an account for *all* demands growing out of the administration of the public lands. Heretofore, under this act, the Commissioner has stated the account, from time to time, for the payment of the five per cent. on the cash sales of the public lands in said States, which is only a part of the public accounts relative to lands; he neglects and refuses to state any account for five per cent. for the sale of lands in exchange for the government's own paper obligations, called military warrants. The latter is no less a duty under the law, than the former, for it is necessarily included under the phrase *all* public accounts. Neither are referred to in the law by the designation of five per cent. but both are alike public accounts to be stated under the law,

and a failure to execute the whole law according to its requirements should be remedied by this court under this proceeding by reminding the Commissioner that all accounts growing out of land transactions are to be stated when expressly enjoined by law, as in this case, and not simply a part thereof.

The performance of such a duty is, perhaps, more pointedly and imperatively imposed by the acts of Congress, passed March 2nd, 1855, and the 3rd of March, 1857, entitled acts to settle accounts between the United States and the States of Alabama, Mississippi and other States.

They read as follows:—

AN ACT TO SETTLE CERTAIN ACCOUNTS BETWEEN THE UNITED STATES AND THE STATE OF ALABAMA.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,*

That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Alabama, for the purpose of ascertaining what sum or sums of money are due to said State heretofore unsettled under the act of March 2, 1819, for the admission of Alabama into the Union, and that he be required to include in said account the several reservations under the various treaties with the Chickasaw, Choctaw, and Creek Indians within the limits of Alabama, and allow and pay to said State five per cent. thereon as in case of *other sales.*"

AN ACT TO SETTLE CERTAIN ACCOUNTS BETWEEN THE UNITED STATES AND THE STATE OF MISSISSIPPI AND OTHER STATES.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,*

That the Commissioner of the General Land Office be, and he is hereby, required to state an account between

the United States and the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the *same principles and allowance* as prescribed in the 'Act to settle certain accounts between the United States and the State of Alabama,' approved the 2d of March, 1855; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to the said State 5 per centum thereon as in case of *other sales*, estimating the lands at the value of $1.25 per acre.

"SEC. 2. *And be it further enacted*, That the said Commissioner shall also state an account between the United States and *each* of the *other States* upon the same *principles* and shall allow and pay to *each* State such amount as shall thus be found due, estimating all lands and permanent reservations at $1.25 per acre."

Approved March 3rd, 1857.

These acts are substantially the same in their import and requirements, and they apply alike to *all* States that are entitled to the payment of five per cent. on the sale of the public land within their borders, or that contain permanent Indian reservations.

As will be seen, from inspection, they require the Commissioner of the General Land Office to do two things, namely, to pay five per cent. upon Indian reservations, which has no connection with the subject now under discussion; and, secondly, to state an account between the United States and the State of Alabama, for the purpose of ascertaining what sum of money is due said State, heretofore unsettled under the Act of March 2d, 1819, for the admission of said State into the Union.

This shows two things very clearly: 1st. That there was an account unsettled between the two governments at the date

of the act; and secondly, that that account relates to the five per cent. which the United States had stipulated to pay on the sales of the public lands, for, aside from this, there is *no other provision* in said act out of which an account could arise in favor of the State against the General Government.

The question, then, arises, what account heretofore unsettled did the Act of March 2d, 1819, for the admission of the State of Alabama into the Union refer to? But one answer can be given to this question, and that is its undoubted reference to the payment of five per cent. on military locations of land, which was the only account, under said law, that had not been settled at the date of that act; and this is as certain and unmistakable as if the law had declared it in so many words instead of using the particular phraseology which it did; and that, too, more especially for the reason that there was no other unsettled account, under the law, to be audited and paid except the 5 per cent. on lands purchased with military warrants; and this is relieved of all doubt, inasmuch as the books of the Land Office show that the five per cent. on the cash sales of lands in Alabama had been settled and paid up to the 23d of October, 1854, being within three or four months of the date of said act. (See certificate of Land Officer as to payment of five per cent. on cash sales at or near date of law in said State.) There was, therefore, no unsettled account on the cash sales of the public lands in Alabama, and, as a matter of fact, no laches, so far as is known, has ever been imputed to the Government in the payment of the five per cent. on the cash sales of the public lands; this duty has been periodically performed, without complaint, as the account has accrued.

Now, the question again recurs, did not Congress by the language employed in this act intend to include accounts heretofore unsettled on lands which military warrants had been located? If not, what lands does the acts refer to? It is believed no other lands can be conceived of or pointed

out. And if our construction of the act is not the true one, then it follows the act is without meaning and objectless. But we are not at liberty to put such a construction upon the law if we can find an object upon which it can take effect and operate. We claim, therefore, that this law is mandatory and imperative upon the commissioner; that his duty thereunder is purely ministerial; that he has no dispensing power whereby he can evade, at his discretion, the duty which it fixes and imposes upon him. The foregoing remarks apply with equal force to the second act passed March 3d, 1857, for the benefit of the State of Mississippi and other States, which also provides that the Commissioner shall state an account between the government and the other States for the purpose of ascertaining what sum of money is due to said States, heretofore unsettled on account of the public lands, in the same *manner* and upon the same *principles* and allowances as prescribed in the act to settle certain accounts between the United States and the State of Alabama.

It will be recollected that the account, required to be stated by the Alabama act, specifically related to unsettled balances due on the five per cent. clause in her act of admission, and necessarily could not refer to any other account than that arising upon the entry and purchase of lands with military land warrants, inasmuch, as before stated, the five per cent. on cash sales had all been paid up to near the date of the act. Now this Alabama act is made applicable to the States of Iowa and Illinois on the same *principles* and *allowance*, and can refer to no other unsettled account than that which grows out of the five per cent. clause of their acts of admission.

But at the date of this 2d act in Iowa and Illinois, as in Alabama, the five per cent. on cash sales had been regularly paid, and no complaint on that score had been made. There was, however, at that time, a large sum of money due and

unsettled on account of lands in said States which had been taken up and disposed of for military land warrants: and the very first Legislature of the State of Iowa, after the passage of said act, namely: in the winter and spring of 1858, the governor thereof was authorized by a joint resolution of the same to proceed to Washington and demand an adjustment of the account and a payment of the same. This was done, and the request refused. During the war the application was suspended; since the readjustment of the country after the war, it has been renewed, but with no avail. The records and files of the Land Office show precisely the quantity of land in these States entered with land warrants, and the amount due each State thereon at five per cent., on an estimate of $1.25 per acre. Now, with reference to this very account, Congress says to the Commissioner, you are required to state the same that it may be known how much is due to these States under the five per cent. stipulation of the act admitting the same into the Union, and he says he wont do it.

He was not at liberty to refuse on the ground that the claim itself, should it be found to exist, was illegal, and the State not entitled to receive the same, for that was a question he could not consider—it had been withdrawn from him by the act itself. If Congress had adjudged it illegal, the Commissioner would not have been required to state it.

Again, the Commissioner was not at liberty to refuse, on the ground that it was a political question, for clearly it was not; nor on the ground that it would be unwise and inexpedient, for these were questions, already disposed of by Congress in imposing the duty—a duty purely ministerial—clearly mandatory, stripped of all conditions and limitations that would give the slightest pretense for the exercise of judgment or discretion. And yet the Commissioner says he will not perform this duty, setting himself directly in opposition of the law, which, thus far, has been a dead letter,

and will remain so until this court, by its mandate, shall order otherwise.

It is not expected that this court will conclude that the acts referred to contemplate but one object, namely, that simply of directing the Commissioner to pay five per cent. on permanent Indian reservations at a value of $1.25 per acre, for this was a right of a new creation, and for the first time granted in the history of the Government; and hence no unsettled accounts had yet arisen under the same.

Again, if this was the only object of these acts, there could have been no occasion to refer to the acts admitting said States into the Union, for the reason that not the slightest reference is made to Indian reservations in said acts. But it is evident from the language of said acts, entitled acts to settle accounts between the United States and the States of Alabama, Mississippi, and other States, that they have a two-fold purpose—first, that the Commissioner shall ascertain what sum or sums of money are due said States heretofore unsettled under the law admitting them into the Union, and then, secondly, to include in that five per cent. on Indian reservations. This construction is sustained by the late Judge Curtis, formerly a member of this court, who, in expressing his opinion of the two per cent. claim of the State of Illinois against the Government, took occasion to interpret the acts above referred to, and he says, first:

> "Whether this legislation had any other scope or effect than this: to direct the Commissioner, in stating an account, to include Indian and other reservations, I find myself unable to entertain any doubt. The act in question, by its first section, requires an account to be stated, for the purpose of ascertaining what sum or sums of money are due to said State heretofore unsettled, on account of the public lands in said State, and it directs and requires that in stating that account the Commissioner of the General Land Office, who is commanded to state the same, shall include certain described items. I

am unable to perceive why the whole of this mandate of the legislature should not be obeyed. And, if the whole is to be obeyed, then there must be, first, an account stated of the sum or sums of money due to the State. Second, there must be included therein the items designated.

"To state an account of the items specially required to be included therein, would not approach so near to compliance with the act as to state an account of the sums of money due to the State without including these special allowances. The latter would obey the general order of Congress and disregard one of its details. The former would disregard the general order to state an account, and substitute in its place obedience to a special direction as to particular items to be included therein.

"It is every day's practice of courts to order an account to be taken covering a particular subject-matter, and to direct that certain items shall be included in the account. I never supposed any one could believe that such an order would be complied with by taking an account of the items specially directed to be included in the account. * * * * The question being whether the account is to be restricted to 'reservations,' or is to include all sales of public lands, how is it possible to escape from the express words of the act that the account is to be what is due '*on account of the public lands in said State*,' and the reservations are to be 'included' as one of its items.

"If this is true, as between the State of Mississippi and the United States, it is equally true as between the State of Illinois and the United States, by force of the second section of the act of March 3, 1857, which applies 'the same principles' to each of the other States."

This construction of said acts we suppose will hardly be controverted. Assuming it to be the true construction, then it follows that said acts also authorize the Commissioner to perform two things, one of a general nature, the

other special. Both are alike absolute and peremptory in their requirements. The latter is specified, namely, five per cent. on Indian reservations; the former, although general, is limited to the ascertainment of what is due to said States, heretofore unsettled under their acts of admission into the Union. Now, as there is no pretence that there is anything due to said States on account of public lands, except that which arises under the five per cent. clause of the acts of admission, and inasmuch as this has been paid on the cash sales of the public lands, so it follows that whatever then is still unsettled, it must be for sales of land purchased with the Government paper, called military land warrants, and this by the terms of the law, is the account required to be stated, without any qualification whatever.

Suppose the Commissioner should refuse to state an account for the five per cent. on Indian reservations, would not this court, in a case properly made before it, compel him to do so? Why not? There is certainly no room for the exercise of his discretion in this requirement of the act; and yet it is not more specific and mandatory than the other more important duty required to be done. On this point Judge Curtis makes a very just and pertinent remark. Read it again; he says:

> "To state an account of the items specially required to be included therein, would not approach so near to compliance with the act, as to state an account of the sums of money due to the State, without including these special allowances. The latter would obey the general order of Congress, and disregard one of its details. The former would disregard the general order to state an account, and substitute in its place obedience to a special direction as to particular items to be included therein."

We have said, perhaps, enough on the two principal questions involved in this controversy. To the Western States,

they are matters of great interest and gravity. For years they have been seeking a recognition of the same, and a payment of the claim set up. To settle their rights in the premises by solemn adjudication, this court is now appealed to, and we would fain hope, in view of its great importance, embracing the interest of some eighteen sovereign States, that it will not be pushed aside, or disposed of upon some technical rule of law or practice, which would defeat the ends of common remedial justice. It is not known that more than four or five applications for writs of mandamus have ever been made to this court in the exercise of its original jurisdiction, namely, *Brailsford* v. *Georgia; Oswall* v. *New York; Chisholm's Executors* v. *Georgia; The Commonwealth of Kentucky* v. *Dennison, Governor, of Ohio*, and afterwards the *Same State* v. *Boutwell, Secretary of the Treasury*. Aside from these all the other cases of this discription have come before this court by appeal. And it is submitted whether the strict rules and limitations which the decisions of this court have put upon the power of the local courts of the District of Columbia in issuing writs of mandamus to executive officers of the United States, ought to be enforced in all respects in cases of original jurisdiction, *conferred upon it* by the constitution and by section 688 of the Revised Statutes, especially when by the provisions of the constitution this court have no jurisdiction of controversies, in which the United States is a party, except by appeal, and a State has no original standing in any of the courts of the country but in the Supreme Court of the United States, and the two governments therefore can never be parties to the same suit, in consequence of which the rights of a State in cases of this kind are shut up to a remedy against the officer. Under such circumstances it does seem to us that this suggestion is worthy of the consideration of the court, and would justify a relaxation, should it be found necessary, of the more rigid rules applicable to writs of this

kind against the officials of the Government, who would be only too glad if the court would intimate to them their duty in the premises. And it is believed the public men and country at large would be equally pleased, if there could be a final disposition of this case upon its merits.

R. P. LOWE,
W. W. WILSHIRE,
*Attorneys for Relators.*

# APPENDIX.

*Vol. II, Stat. at Large, p. 175.*

## Ohio—A.

3d. That one-twentieth part of the net proceeds of the lands lying within the said State sold by Congress from and after the 30th day of June next, after deducting all expenses incident to the same, shall be applied to the laying out and making public roads, leading from the navigable waters emptying into the Atlantic to the Ohio, to the said State and through the same, such roads to be laid out under the authority of Congress, with the consent of the several States through which the road shall pass: *Provided always*, That the three foregoing propositions, herein offered, are on the conditions that the convention of the said State shall provide by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by Congress from and after the 30th day of June next, shall be and remain exempt from any tax laid by order or under authority of the State, whether for State, county, township or any other purpose whatever, for the term of five years from and after the day of sale.

Approved April 30th, 1802.

*Vol. II, Stat. at Large, p. 226.*

SEC. 2. *And be it further enacted*, That the Secretary of the Treasury shall, from time to time, and whenever the quarterly accounts of the receivers of public moneys of the several land offices shall be settled, pay three per cent. of the net proceeds of the lands of the United States lying within the State of Ohio, which, since the thirtieth day of June last, has been, or hereafter may be sold by the United States, after deducting all expenses incidental to the same, to such person or persons as may be authorized by the legislature of the said State to receive the same, which sums thus paid shall be applied to the laying out, opening

and making roads within the said State, and to no other purpose whatever; and an annual account of the application of the same shall be transmitted to the Secretary of the Treasury by such officer of the State as the legislature thereof shall direct; and it is hereby declared that the payments thus to be made, as well as the several appropriations for schools made by the preceding section, are in conformity with, and in consideration of, the conditions agreed on by the State of Ohio by the ordinance of the convention of the said State, bearing date the 29th day of November last.

Approved March 3d, 1803.

---

## Indiana—B.

*Stat. at Large, Vol. III, p. 290.*

3d. That five per cent. of the net proceeds of the lands lying within the said Territory, and which shall be sold by Congress from and after the first day of December next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within the said State, under the direction of the legislature thereof, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress: *And provided always*, That the five foregoing provisions, herein offered, are on the conditions that the convention of the said State shall provide by an ordinance, irrevocable without the consent of the United States; that every and each tract of land sold by the United States, from and after the first day of December next, shall be and remain exempt from any tax laid by order or under any authority of the State, whether for State, county or township or any other purpose whatever, for the term of five years from and after the day of sale.

Approved April 19th, 1816.

---

## Illinois—C.

*Vol. III, Stat. at Large, p. 430.*

*Third.* That five per cent. of the net proceeds of the lands lying within such State and which shall be sold by Congress, from and after the first day of January, 1819, after deduct-

ing all expenses incident to the same, shall be reserved for the purposes following, viz: two-fifths to be disbursed under the direction of Congress, in making roads leading to the State; the residue to be appropriated by the Legislature of the State, for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university: *Provided always*, That the four foregoing propositions, herein offered, are on the conditions that the convention of the said State shall provide by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by the United States, from and after the 1st day of January, 1819, shall be exempt from any tax laid by order, or under any authority of the State, whether for State, county or township, or any other purpose whatever, for the term of five years from and after the day of sale: *And further*, That the bounty lands granted or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt as aforesaid, from all taxes, for the term of three years, from and after the date of the patents respectively; and that all the lands belonging to citizens of the United States, residing without the said State, shall never be taxed higher than lands belonging to persons residing therein.

Approved April 18, 1818.

---

## Missouri—D.

*Vol. III. Stat. at Large, p. 547.*

3d. That five per cent. of the net proceeds of the sale of lands lying within the said Territory or State, and which shall be sold by Congress, from and after the 1st day of January next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within the State, under the direction of the legislature thereof: and the other two-fifths in defraying, under the directions of Congress, the expenses to be incurred in making of a road or roads, canal or canals, leading to the said State: *Provided*, That the five foregoing propositions herein offered are on the condition that the convention of the said State

shall provide by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of January next, shall remain exempt from any tax laid by order or under the authority of the State, whether for State, county or township, or any other purpose whatever, for the term of five years from and after the day of sale: *And further*, That the bounty lands granted, or hereafter to be granted for military services during the late war, shall, while they continue to be held by the patentees, or their heirs, remain exempt as aforesaid from taxation for the term of three years from and after the date of the patents respectively.

Approved March 6th, 1820.

---

## Iowa—E.

*Vol. V., Stat. at Large, p. 790.*

*Fifth.* That five per cent. of the net proceeds of sales of all public lands lying within the said State, which have been or shall be sold by Congress, from and after the admission of said State, after deducting all the expenses incident to the same, shall be appropriated for making public roads and canals within the said State, as the legislature may direct: *Provided*, That the five foregoing propositions herein offered are on the condition that the legislature of the said State, by virtue of the powers conferred upon it by the convention which framed the constitution of the said State, shall provide by an ordinance, irrevocable without the consent of the United States, that the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof; and that no tax shall be imposed on lands the property of the United States, and in no case shall non-resident proprietors be taxed higher than residents; and that the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by

order or under the authority of the State, whether for State, county or township, or any other purpose, for the term of three years from and after the dates of the patents, respectively.

Approved March 3d, 1845

---

## F.

[Journal of American Congress, 1776.]

August 27th, 1776.—Congress offers to all foreign officers and soldiers who shall leave the armies of His Britannic Majesty, unappropriated lands in the following proportion, to them and their heirs in absolute dominion: To a Colonel, 1000 acres; Lieutenant-Colonel, 800 acres; Major, 600 acres; Captain, 400 acres; Ensign, 200 acres; Soldiers, 100 acres.

[Journal of American Congress, 1776.]

September 16th, 1776.—To provide for the raising of 88 battalions to serve for the war. Resolution in Congress:

*Resolved*, That in addition to a money bounty of $20 to each non-commissioned officer and private soldier, Congress make provision for granting lands, in the following proportions: To the officers and soldiers who shall engage in the service, and continue therein to the close of the war, or until discharged by Congress, and to the representatives of such officers and soldiers as shall be slain by the enemy, such lands to be provided by the United States, and whatever expense shall be necessary to procure such lands, the said expense shall be paid and borne by the United States in the same proportion as the other expenses of the war, viz.: To a Colonel, 500 acres; to a Lieutenant-Colonel, 450 acres; to a Major, 400 acres; to a Captain, 300 acres; to a Lieutenant, 200 acres; to an Ensign, 150 acres; to each non-commissioned officer and soldier, 100 acres.

## G.

[In Congress, Vol. 1, Page 563.]

May 20th, 1785.—To make effectual the foregoing resolution, Congress ordained that the Secretary of War, from

the returns of his office, or such other sufficient evidence as the nature of the case will admit, determine who are the objects of the above resolution and engagement, and the quality of land to which such person or their representatives are respectively entitled, etc., etc.

[Henning Statute, Vol. 9, Page 179, of the Commonwealth of Virginia.]

October, 1776.—An act for raising six additional battalions of infantry on the continental establishment.

Whereas, It has been thought necessary by the American Congress, that the armies of the United States should be augmented to eighty-eight battalions, to be enlisted to serve during the continuance of the present war, unless sooner discharged, and that fifteen of said battalions should be furnished by this commonwealth, and that the said Congress, by their resolutions, have to give to every non-commissioned officer and private soldier a present bounty of twenty dollars. * * * * And to provide the following portion of land to be given at the close of the war, or whenever so discharged, to the officers and soldiers who shall engage in said service, or to their representatives if slain by the enemy: To every non-commissioned officer or soldier, 100 acres; to every Ensign, 150 acres; to every Lieutenant, 200 acres; to every Captain, 300 acres; to every Major, 400 acres; to every Lieutenant-Colonel, 450 acres; to every Colonel, 500 acres.

Be it therefore enacted by the General Assembly of the commonwealth of Virginia, That it shall and may be lawful for the Governor, with the advice of his privy council, and he and they are hereby required to take such measures as to them shall seem most expedient for engaging the said battalions. * * * * And for that purpose to give recruiting powers to the officers commanding the same, or to send special commissioners, if that measure shall appear more effectual, or to adopt any other way or means most likely to procure their speedy enlistment, etc.

[Henning's Statute at Large, Vol. 9, Page 558.]

October, 1778.—An act for the speedy recruiting of the Virginia regiments or continental establishment.

Whereas, The different modes heretofore adopted for the making up of the deficiencies in the quota of Continental

troops to be furnished by this State, have been found inadequate to the purpose, and it is indispensably necessary that the regiments of infantry be speedily recruited to render the operations of the ensuing campaign more decisive and honorable to the American arms:

Be it enacted that 2,216 men, rank and file, be forthwith raised within this commonwealth, and that each person who shall enlist to serve eighteen months, to commence from the day of their several rendezvous, shall be entitled to $300, and that each person who will enlist for three years or during the war, shall be entitled to $400, together with the Continental bounty of lands, etc., etc.

[Henning's Statute, vol. 10, p. 24.]

May, 1779.—Land extended to the marine; also to the soldiers under Col. George Rogers Clark; also to Chaplains and Surgeons and their mates.

[Henning's Statute, vol. 10, p. 160.]

October, 1779.—This act declares the quantity of land which it was intended the officers and soldiers should have at the end of the war, namely: Colonel, 5,000 acres; Lieutenant-Colonel, 4,500 acres; Major, 4,000 acres; Captain, 3,000 acres; every subaltern, 2,000 acres; every non-commissioned officer, 400 acres; every soldier or sailor 200 acres.

## H.

The cession by Virginia to the Federal Government of the northwestern territory, in March, 1784, it is provided that the general government shall assume the obligations or engagements of Virginia to pay Gen. George Rogers Clark and his soldiers 150,000 acres of land, and also the Virginia soldiers their lands, in the following words, namely: That in case the granting of good land on the southeast side of the Ohio, upon the waters of the Cumberland river, and between the Green river and the Tennessee river which has been reserved by law for the Virginia troops upon Continental establishment, should, from the North Carolina line, bearing in farther upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said

troops in good lands, to be laid off between the Sciota and Little Miami, on the northwest side of the river Ohio, in proportion as have been engaged to them by the laws of Virginia. That all the lands within the territory so ceded to the United States, and reserved for, or appropriated to, any of the before mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the federal confederation or federal alliance of said States, etc., etc.

## I.

[United States Statutes at Large, vol. 2, p. 669.]

December 24, 1811.—An act for completing the existing military establishment.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the military establishment as now authorized by law be immediately completed.

SEC. 2. And be it further enacted, That there be allowed and paid to each effective, able-bodied man, recruited or re-enlisted for that service for the term of five years, unless sooner discharged, the sum of sixteen dollars; but the payment of one-half of said bounty shall be deferred until he shall be mustered and have joined the corps in which he is to serve; and whenever any non-commissioned officer or soldier shall be discharged from the service, who shall have obtained from the commanding officer of his company, battalion or regiment a certificate that he had faithfully performed his duty while in service, he shall moreover be allowed and paid in addition to the aforesaid bounty, three months' pay and one hundred and sixty acres of land; and the heirs and representatives of those non-commissioned officers or soldiers who may be killed in action, or die in the service of the United States, shall likewise be paid and allowed the said additional bounty of three months' pay and one hundred and sixty acres of land, to be designated, surveyed and laid off at the public expense, in such manner and upon such terms and conditions as may be provided by law.

January 11th, 1812.—An act to raise additional military force.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be immediately raised ten regiments of infantry, two of artillery and one regiment of light dragoons, to be enlisted for the term of five years unless sooner discharged.

* * * * *

SEC. 12. And be it further enacted, That there shall be allowed and paid to each effective, able-bodied man recruited as aforesaid to serve for the term of five years, a bounty of sixteen dollars, but the payment of eight dollars of the said bounty shall be deferred until he shall be mustered, and have joined some military corps of the United States for service, and whenever any non-commissioned officer or soldier shall be discharged from service, who shall have obtained from the commanding officer of his company, battalion or regiment a certificate that he had faithfully performed his duty whilst in service, he shall, moreover, be allowed and paid in addition to the said bounty, three months' pay and one hundred and sixty acres of land, and the heirs and representatives of those non-commissioned officers or soldiers who may be killed in action or die in the service of the United States, shall likewise be paid and allowed the said additional bounty of three months' pay and one hundred and sixty acres of land to be designated, surveyed and laid off at the public expense in such a manner and upon such terms and conditions as may be provided by law.

[Vol. 2, p. 676.]

February 6th, 1812.—An act authorizing the President of the United States to accept and organize certain volunteer military corps.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and he is hereby authorized to accept of any company or companies of volunteers either of artillery, cavalry or infantry who may associate and offer themselves for the service, not exceeding fifty thousand men, who shall be clothed, and in

case of cavalry, furnished with horses at their own expense and armed and equipped at the expense of the United States after they shall be called into service, and whose commissioned officers shall be appointed in the manner prescribed by law in the several States and Territories to which such company shall respectively belong; provided, that where any company, battalion, regiment, brigade or division shall continue to be commanded by the officers holding commissions in the same at the time of such tender, and any vacancy thereafter occuring, shall be filled in the mode pointed out by law in the State or Territory wherein the said company, battalion, regiment, brigade or division shall have been originally raised. * * *

SEC. 6. And be it further enacted, That the heirs and representatives of any non-commissioned officer or soldier who may be killed in action or die in actual service of the United States, shall be entitled to receive one hundred and sixty acres of land, to be designated, surveyed and laid off at the public expense in such manner and upon such terms and conditions as may be provided by law.

[Vol. 2, p. 788.]

December 12th, 1812.—An act increasing the pay of non-commissioned officers, musicians, privates and others of the army and for other purposes.

SEC. 3. And be it further enacted, That every non-commissioned officer, musician and private who shall, on the promulgation of this act, be recruited into the regular army of the United States, may, at his option, to be made at the time of enlistment, engage to serve during the present war with Great Britain instead of the term of five years, and shall, in case he makes such option, be entitled to the same bounty in money and land and to all other allowances and be subject to the same rules and regulations as if he had enlisted for the term of five years.

[Vol. 3, p. 96.]

January 27th, 1814.—An act making further provision for filling the ranks of the regular army, encouraging enlistments for longer periods of men whose terms of service are about to expire.

SECTION 1. *Be it enacted by the Senate and House of Rep-*

*resentatives of the United States of America in Congress assembled*, That in order to complete the present military establishment to the full number authorized by Congress and the law with the greatest possible dispatch, there shall be paid to each effective, able-bodied man who shall, after the first day of February next, be enlisted into the army of the United States, to serve for the term of five years or during the war, at his election or in lieu of the bounty in money and of three months' pay at the expiration of the service, now allowed by law, the sum of one hundred and twenty-four dollars, fifty dollars of which to be paid at the time the recruit is enlisted, fifty dollars when he shall be mustered and have joined some military corps or service, and twenty-four dollars when he shall be discharged from service; and the wife and children, and if he leave no wife or children, the parents of such non-commissioned officers and soldiers enlisted as hereinbefore stated, who may be killed in action or die in the service of the United States, shall be allowed and paid the sum of twenty-four dollars; and after the first day of February next, so much of the fourth section of the act entitled "An act for the more perfect organization of the army of the United States," passed the twentieth day of January, one thousand eight hundred and thirteen, as also to each able-bodied man enlisted into the service of the United States in the manner therein stated, an advance of twenty-four dollars on account of his pay, shall be and the same is hereby repealed. * * * *

SEC. 3. *And be it further enacted*, That every non-commissioned officer, musician and private who has been recruited in the regular army of the United States under the authority of the act of the 8th of April, 1812, entitled "An act to raise an additional military force passed January 11th, 1812," may be re-enlisted for the term of five years or during the war, and that every non-commissioned officer, musician and private recruited under the authority of the act of the 29th of January, 1812, entitled "An act in addition to the act entitled an act to raise an additional military force, and for other purposes," may be re-enlisted for five years or during the war.

[Page 97.]

SEC. 4. *And be it further enacted*, That the non-commissioned officers, musicians and privates re-enlisted under the

authority of the preceding section, shall be entitled to the bounty allowed by this act to recruits for five years or during the war.

[Vol. 3, chap. 9.]

January 24th, 1814.—An act authorizing the President of the United States to cause certain regiments therein mentioned to be enlisted for five years or during the war.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and he is hereby authorized and empowered to cause to be enlisted for the term of five years or during the war, the fourteen regiments of infantry which are now by law authorized to be enlisted for the term of one year, or such number of them, or of the troops composing the same, as in his opinion will best promote the public service.

SEC. 2. *And be it further enacted*, That each man enlisted under the authority of this act shall be allowed the same bounty in money and land as is now allowed by law to men enlisted for five years or during the war, and that the officers, non-commissioned officers, musicians and privates, shall receive the same pay, clothing, subsistence and forage, be entitled to the same benefits, be subject to the same rules and regulations, and be placed in every respect on the same footing as the other regular troops of the United States.

[Vol. 3, Chap. 11.]

February 10th, 1814.—An act to raise three regiments of riflemen.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be immediately raised such number of regiments of riflemen, not exceeding as in the opinion of the President will best promote the military service, to serve for five years or during the war, unless sooner discharged. * *

SEC. 4. *And be it further enacted*, That each man recruited under the authority of this act be allowed the same bounty in money and land as is allowed by law to men enlisted for five years or during the war, and that the officers, non-commissioned officers, musicians and privates shall receive the same pay, clothing, subsistence and forage, and be entitled

to the same provisions for wounds and disabilities, the same benefits and allowances, and be placed in every respect on the same footing as the other regular troops of the United States.

[Vol. 3, p. 124.]

April 18th, 1814.—An act authorizing an augmentation of the marine corps and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and he is hereby, authorized to cause the marine corps in the service of the United States to be augmented by the appointment and enlistment of not exceeding one Major, fourteen Captains, twelve First Lieutenants, twenty Second Lieutenants, sixty-one Sergeants, forty-two drummers and fifers and six hundred and ninety-six privates, who shall be respectively allowed the same pay, bounty, rations and clothing, and shall be employed under the same rules and regulations to which the said marine corps are, and shall be entitled and subject. * * * *

[Vol. 3, Chap. 10.]

December 10th, 1814.—An act making further provisions for filling the ranks of the army of the United States.

SEC. 4. And be it further enacted, That in lieu of the bounty of one hundred and sixty acres of land now allowed by law, there shall be allowed to non-commissioned officers and soldiers hereafter enlisted, when discharged, from service, who shall have obtained from the commanding officer of company, battalion or regiment, a certificate that he had faithfully performed his duty while in service, three hundred and twenty acres of land to be surveyed, laid off and granted under the same regulation, and in every respect in a manner prescribed by law, and the widow and children, and if there be no widow and children, the parents of every non-commissioned officer and soldier enlisted according to law, who may be killed or die in the service of the United States shall be paid, but the same shall not pass to collateral relations, any law heretofore passed to the contrary notwithstanding.

## K.

[Vol. 9, p. 124.]

February 11th, 1847.—An act to raise for a limited time an additional military force, and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in addition to the present military establishment of the United States, there shall be raised and organized under the direction of the President for and during the war with Mexico, one regiment of dragoons and nine regiments of infantry, each to be composed of the same number and rank of commissioned and non-commissioned officers, buglers, musicians and privates, &c., as are provided for a regiment of dragroons and infantry respectively under existing laws, and allowances according to their respective grades, and be subject to the same regulations and to the rules and articles of war.

SEC. 2. And be it further enacted, That during the continuance of the war with Mexico, the term of enlistment for the men to be recruited for the regiments authorized by this act, shall be during the war, unless sooner discharged. *

* * * * * *

[Page 125.]

February 11th, 1847.—SEC. 9. And be it further enacted, That each non-commissioned officer, private or musician enlisted or to be enlisted in the regular army, or regularly mustered in any volunteer company for a period of not less than twelve months, who has served or may serve during the present war with Mexico, and who shall receive an honorable discharge, or who shall have been killed, or died of wounds received or sickness incurred in the course of such service, or who shall have been discharged before the expiration of his term of service in consequence of wounds received or sickness incurred in the course of such service, shall be entitled to receive a certificate or warrant from the War Department for the quantity of one hundred and sixty acres, and which may be located by the warrantee, or his heirs at law at any land office of the United States, in one body and in conformity to the legal sub-division of the public lands in such district then subject to private entry;

and upon the return of such certificate or warrant, with evidence of the location thereof having been legally made to the General Land office, a patent shall be issued therefor.

Provided, further, that every such non-commissioned officer, musician or private who may be entitled under the provisions of this act to receive a certificate or warrant for one hundred and sixty acres of land, shall be allowed the option to receive such certificate or warranty, or a treasury script for one hundred dollars; and such script whenever it is preferred, shall be issued by the Secretary of the Treasury to such person or persons as would be authorized to receive such certificate or warrants for lands; said script to bear an interest of six per cent. per annum, payable semi-annually, redeemable at the pleasure of the Government, and that each private, non-commissioned officer and musician who shall have been received into the service of the United States, since the commencement of the war with Mexico, for less than twelve months and shall have served for such term or until honorably discharged, shall be entitled to receive a warrant for forty acres of land, which may be subject to private entry, or twenty-five dollars in script if preferred.

[Vol. 9, p. 183.]

March 3, 1847.—An act to amend an act entitled "an act of raise for a limited time an additional military force, and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That under the provisions of the ninth section of the act approved February 11th, 1847, entitled "an act to raise for a limited time an additional military force, and for other purposes," it shall be the duty of the Secretary of the Treasury to issue Treasury script as therein provided, on the certificate of the Secretary of War, showing the claimant entitled thereto, and not otherwise, and that the stock thus issued shall bear interest from the day of presenting to the Treasury Department such certificate of the Secretary of War in due form, and the interest thereon shall be paid on the first days of January and July in each year, and shall be transferable on the books of the Treas-

ury Department kept in the Register's office, such certificate shall be signed by the Register of the Treasury under the direction of the Secretary, who shall cause the seal of the Department to be affixed thereto, and no other signature shall be required to said stock.

[Vol. 9, p. 520.]

September 28th, 1850.—An act granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That each of the surviving, or widow or minor children of deceased, commissioned or non-commissioned officers, musicians or privates, whether of regulars, volunteers, rangers or militia, who performed military service in the regiment, company or detachment, in the service of the United States, in the war with Great Britain, declared by the United States on the eighteenth day of June, eighteen hundred and twelve, or in any of the Indian wars since seventeen hundred and ninety, and each of the commissioned officers who was engaged in the military service of the United States in the late war with Mexico, shall be entitled to lands as follows: Those who engaged twelve months, or during the war, and actually served nine months, shall receive one hundred and sixty acres, and those who engaged to serve six months, and actually served four months, shall receive eighty acres, and those who engaged to serve for any, or indefinite period, and actually served one month shall receive forty acres.

---

JOINT RESOLUTION IN REGARD TO FIVE PER CENT. FUND.

*Resolved by the General Assembly of the State of Iowa:* That should the Congress of the United States, at its present session, neglect or refuse to comply with the prayer of a certain memorial passed during the present session of the General Assembly in regard to the five per cent. fund claimed to be due the State, the Governor is hereby authorized and required to institute a suit in the Court of Claims, in the name and for the benefit of the State against the

United States, for the recovery of any amount that may be found due the State on account of the location of land warrants on the public lands by which the State has been deprived of the benefit of the five per cent. due the State had such lands been paid for in money.

Approved March 22d, 1858.

---

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *2d March*, 1883.

I, H. M. Teller, Secretary of the Interior, hereby certify that the paper hereto attached is a true copy of the original now on file in this Department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department to be affixed, the day and year first above written.

[SEAL.] H. M. TELLER,
*Secretary.*

---

**M.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 25, 1883.*

Hon. R. P. LOWE,
*Present.*

SIR: In reply to your letter of the 18th inst., I have to state that the three and two per centum fund accounts, respectively, in favor of the "State of Alabama, immediately prior to 2d March, 1855," were adjusted by this office October 23d, 1854, and that the per centum fund accounts in favor of Mississippi, Iowa and Illinois (immediately) prior to 3d March, 1857, were adjusted as follows, viz:

Mississippi two per centum, Nov. 30, 1855.
" three " " " " "
Iowa five per centum, Aug. 27, 1856.
Illinois three per centum, July 31, 1856.

In lieu of the two per centum of the net proceeds of the sales of the public lands in the State of Illinois, an amount equivalent thereto was applied to the cost of construction of the Cumberland road, under the various acts relating to the same,

Very respectfully,

A. C. McFARLAND,
*Commissioner.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1883.

| | |
|---|---|
| THE STATE OF IOWA, &c., *vs.* N. C. McFARLAND, COMMISSIONER, &c. *and* THE STATE OF ILLINOIS *sv.* THE SAME. | ORIGINAL. Petitions in mandamus. |

BRIEF FOR THE COMMISSIONER.

# In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE STATE OF IOWA, &c.,
*vs.*
N. C. McFARLAND, COMMISSIONER, &c.
*and*
THE STATE OF ILLINOIS
*vs.*
THE SAME.

ORIGINAL. Petitions in mandamus.

## BRIEF FOR THE COMMISSIONER.

By the acts which admitted the above States into the Union, upon the performance by them of certain conditions which have been performed and are therefore immaterial here, the United States engaged, amongst other things:

In the case of Iowa:

**That five per cent. of the net proceeds of sales of all public lands lying within the said State which have been or shall be sold by Congress from and after the admission of said State, after deducting all expenses incident to the same, shall be appropriated for making public roads and canals within the said State, as the legislature may direct. (Act of 1845, ch. 76, sec. 6; 5 Stat., p. 790.)**

And in the case of Illinois:

That five per cent. of the net proceeds of the lands lying within said State and which shall be sold by Congress from and after the first day of January 1819, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz: two-fifths to be disbursed under the direction of Congress in making roads leading to the State, the residue to be appropriated by the legislature of the State for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university. (Act of 1818, ch. 67, sec. 6; 3 Stat., 430.)

From time to time since the admission of these States a portion of the public lands within their respective boundaries has been rendered liable to entry under *bounty land warrants* issued by the United States. For some years after the year 1847 large amounts were so entered. By a uniform administration upon the part of the Land Office these dispositions have been held to be not liable to the percentage now in question.

*As regards Iowa*, no protest against this principle was made until the year 1858 (see answer), and that demand having been refused by the Secretary of the Interior no other has been made since until the filing of this petition, although for several years past as is understood, that State has been applying to Congress for relief.

*As regards Illinois*, no objection to these settlements, excepting by the demand which is the foundation of this petition, has been made at any time, and payments to that State upon account of the percentage now demanded have ceased since September 25, 1863. (See exhibit to answer.)

In 1855 (see brief upon behalf of the States, p. 18, and 10 Stat., 630) it was enacted that the Commissioner of the General Land Office should state an account with Alabama for the purpose of ascertaining what sum was then due to the latter upon account of the like percentage with that given in the statutes first-above quoted, with the provision "that he be required to include in said account the several reservations under the various treaties with the Chickasaw, Choctaw, and Creek Indians, within the limits of Alabama, and allow and pay to said State 5 per cent. thereon, as in case of other sales." And in 1857 (same brief, p. 18, and 11 Stat., 200) it was enacted that the Commissioner should state an account between the United States and Mississippi, on account of the public lands in said State, "upon the same principles and allowance" as prescribed in the above act in favor of Alabama; "and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to the said State 5 per centum thereon, as in case of other sales, estimating the lands at the value of $1.25 per acre," also, that the Commissioner should state a similar account "with each of the other States upon the same principles, and shall allow and pay to each State such amount as shall then be found due, estimating all lands and permanent reservations at $1.25 per acre."

That upon the 28th of September, 1863 (see answer), an account was stated with Illinois, under the above act of 1857, limited to *Indian reservations* alone, without ob-

jection by that State; and the amount then found due ($1,565.80) was paid by the United States.

And in the same way and with like incidents (answer), upon the 6th of January, 1873, an account was stated with Iowa, and the balance ($7,562.94) paid.

No claim was made upon behalf of either of these States at the time of such settlements or since (anterior to the present applications) that the act of 1857 warranted an account of the proceeds of lands covered by bounty land warrants.

*As regards both claims*, therefore, it is submitted on behalf of the Commissioner:

1. That neither the act of admission nor that of 1857 warrant the present demand; and this, *either*,

(*a*.) Upon the original wording of these acts; *or*, at least,

(*b*.) Because of their contemporary and long-continued practical construction by the parties.

2. That the action of the Commissioner herein in refusing the present demand, if erroneous, is not subject to contest by mandamus.

1. Neither the acts for admitting Illinois and Iowa nor the act of March 3, 1857 (above), warrants the present demand; and this,

(*a*.) Upon their original wording.

It may be admitted that the reason upon which Congress gave the proceeds of land actually *sold* applies substantially to land *disposed of* by Congress upon any other consideration of value to the United States. But it is denied that an officer of the executive department is authorized to pass upon and give effect to that analogy. In the case *actually* before the eye of Congress there would be *proceeds*, and a clerical act of calculation would show *net* proceeds. It is submitted that for a *ministerial* officer (and this *proceeding*, of course, requires that *pro hac vice* the officer shall be *ministerial*) to declare the existence of that *substantial* sameness, and that *net proceeds* might be represented by some other administrative results, would be to do violence to important principles of constitutional government. The *mechanical details* alluded to in the acts of admission imply that *facts*, and not *mere grounds of argument*, would be found in the public books of account as guides to the officers, whether of the United States or of the States, who should be called upon to administer them. It is to like effect that these acts give no authority to the officers on the part of the United States to place any particular value upon these lands, whether $1.25 per acre, or other—a thing quite necessary, of course, to the ascertainment of their *proceeds*.

This observation shows a substantial difference betwixt this case and the class of cases represented by that of *Watkins*, 97 U. S.: (See last paragraph in the opinion, on page 223.)

Then as to the acts of 1855 and 1857, these of course

are to be read in the light of the previous transactions upon the same matter. Those transactions are, principally, that accounts had been repeatedly settled with Alabama and "each of the other States" without including lands either covered by land warrants or by Indian reservations. Thereupon application is made to Congress for a rectification of such accounts. This *rectification* consists in but one specified item of *surcharge*, viz. Indian reservations, the other expressions in such statutes being no more broad than those in the original acts. It seems therefore that the account was *intended* to be corrected only as to the matter specified. If Congress had intended to correct the accounts as well in regard to land covered by *warrants*, is it supposable that the act of 1857 would not have specified them—the rather that of the two matters they were so much the more important: *ex. gr.* in the case of Iowa, the land covered by *reservations* was worth up to 1873 only $7,562.94, whilst that which had been covered by *warrants* up to two years before (see petition, p. 2) was worth $881,006.60.

The act of 1857 seems plainly to have been worded upon the maxim *ex abundanti cautela*. It refers in the first place to *the principles and allowance* prescribed in the Alabama act of 1855, and then goes on to specify, *additionally*, particular Indian reservations. Now, there are no principles and allowance specified in the Alabama act excepting those affecting Indian reservations. It thus appears that the clause at the close of the first section in the act of 1857, beginning "and that he be required," &c., is surplusage, probably added from excessive caution by an *amendment* whilst the bill was pending. The "principles and allowance" of the act of 1855 is the express standard by which

that of 1857 is to be interpreted. The latter was not intended to carry the grant further, its only *addition*, excepting as to beneficiaries, being a rule as to the *value* of the lands included, which applied to the Alabama act as well.

All that can be fairly deduced from the act of 1857 in this connection is that some of its phrases, if the matter were fresh, might create a *doubt* whether it did not cover lands disposed of *in any way*. But the matter is not *fresh*, but has been concluded by a long train of subsequent general settlements in which no such contention was made; besides a special settlement *under the act of* 1857: with Illinois, in 1863: and with Iowa, in 1873. (See opinion of Attorney-General Hoar, 13 Op., 267.)

*Everything upon the record, with the exception of the one demand by Iowa, in* 1858, *shows that the parties to the above legislation of* 1818 *and* 1845 *understood that lands covered by bounty land warrants were not included therein; and everything, without exception, shows the same as to the act of* 1857.

This last allegation applies to all the States (19 in number) interested in this legislation; *a fact which, by way of anticipation, may be said to make the charge that it is and of course always has been a ministerial duty upon the part of the Commissioner to act to the contrary, at all events, impressive!*

(*b.*) *The contemporaneous construction of the act is, as has already been mentioned in passing, to the same effect.*

It will hardly be suggested in the face of the uniform manner in which this system of statutes has been administered by common consent of all parties for about eighty years (since the admission of Ohio), that its *contradiction* of such manner *is so clear* as to prevent the ordinary operation of *contemporaneous construction*.

2. *This is not a case in which the present Commissioner is amenable to a writ of mandamus*, whatever might have been suggested in that connnection as to some one of his predecessors, about the year 1857; or, more probably, 1845, and 1818. In Decatur's case, 14 Pet., 497, this court said expressly that the circumstance that an official of the Government is embarrassed by action of his predecessors contrary to that which is demanded of him makes a case for the exercise of *discretion*, and, therefore, is not controllable by mandamus. The function of reviewing and reversing departmental precedents is in its nature *judicial*. In 1869 Attorney-General Hoar stated "that since Mr. Wirt's time it *had* been a rule of action prescribed to itself by each administration, to consider the acts of its predecessors conclusive, as far as the executive is concerned." (13 Op., 35. See, also, *ibid*, 457.) It is to be observed that here a *Commissioner* of the Land Office is called upon to overrule action by a preceding *Secretary*.

S. F. PHILLIPS,
*Solicitor-General.*

MEM.—Upon looking into these cases I supposed at first that the claim of Illinois was upon a different footing from that of Iowa,

inasmuch as it is not included in the *permanent appropriations* of Rev. Stat., section 3689 (p. 728); but upon mentioning this I was informed in the Land Office that it had been considered that the statutes giving these percentages are not to be regarded as repealed merely because *omitted* from the revision. This is stated to show that it had not been overlooked; in connection with 11 How. 272, 17 How., 284, &c.

The debates in Congress at the time of the passage of the acts of 1855 and 1857 confirm the conclusion derived from their words. In both cases the bills were explained by their promoters as intended to apply only to Indian reservations. There was no *discussion* in either case, merely a brief statement by a friend of the bill. (See Globe for second session of Thirty-third Congress, pp. 622 and 993; and also for third session of Twenty-fourth Congress, p. 974.

3445——2

110-471

OFFICE SUPREME COURT U.S.
FILED
APR 4 1923
JAMES H. MCKENNEY, CLERK

# Supreme Court of the United States.

ORIGINAL JURISDICTION.

---

THE STATE OF IOWA, ON THE RELATION OF BUREN R. SHERMAN, ITS GOVERNOR,
*vs.*
NOAH C. McFARLAND, COMMISSIONER OF THE GENERAL LAND OFFICE.

Application for Writ of Mandamus.

---

BRIEF BY R. P. LOWE, ATTORNEY FOR RELATOR.

In presenting this application for a writ of mandamus the question *in limine* to be determined is, whether the order for the same can properly be granted under the facts of the case disclosed therein and the principles of law governing such application? If so, then, secondly, whether the claim set up by the State of Iowa is legally entitled to recognition and allowance? Upon the first point we have this to say, for the consideration of the Court, that all the conditions required by the principles and usages of law in a proceeding of this kind are met by the facts in this case, unless, possibly, it should be one; that is to say, a demand for the performance of the duty which we are seeking by this process to have performed has been made upon the proper officer, and his refusal to comply therewith is distinctly alleged. That the relator is entirely without any specific remedy, except by this proceeding, and that the claim being for money, it is affirmed that there are funds sufficient in the Treasury of the United States which is available by appropriation to pay the same.

Now, the point of difficulty above referred to has relation to the nature of the duty which the Commissioner is called upon to execute, whether it is simply ministerial or whether it is one which the officer may or may not perform according to his judgment and discretion. The general principle to be gathered from the various decisions which this Court have made upon this question is this, that the writ will not and should not issue when discretion and judgment are to be exercised by the officer, nor to control him in the manner of conducting the general duties of his office. But it will be granted only when the act required to be done is imposed by law is merely ministerial, and the relator is without any other adequate and legal remedy. The difficulty is in applying so general a rule to particular cases. There should be some more specific rule of law, not only to guide the Court in the exercise of its jurisdiction, but to enable parties to avail themselves of the benefit of the writ with a greater degree of certainty. It is probable, however, that in the case of Marbury *vs.* Madison, 1 Cranch, 133, the Court has laid down the rule in as specific a form as it is susceptible In that case the Court uses this language: "But when the Legislature imposes upon the officer certain duties, when he is directed peremptorily to perform certain acts, when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law, is amenable to the law for his conduct, and cannot at his discretion sport away the vested rights of others." (See 12 Pet., 524, Kendall *vs.* Stocton; 7 Wall., 347, Goines *vs.* Thompson; 1 Cranch, Marbury *vs.* Madison.)

If the Court adhere to this rule it is believed that its jurisdiction to award the writ in this case will become quite apparent upon a due examination of the nature of the act to be done, and the positive requirements of the law to perform it.

Now, there are two separate and distinct acts of Congress which authorize and require the Commissioner of the Land Office to audit and settle all public accounts relative to the

public lands. The first was passed the 25th of April, 1812, and was carried into the revised code and embodied in section 456, and reads as follows: Sec. 456. "All returns relative to the public lands shall be made to the Commissioner of the General Land Office; and he shall have power to audit and settle all public accounts relative to the public lands, and upon the settlement of any such account he shall certify the balance, and transmit the account with the vouchers and certificates to the First Comptroller of the Treasury, for his examination and decision thereon."

It will be observed that this act not only conveys the power to do so, but, in its purpose and object, requires it as a duty that the Commissioner shall audit and settle, not some or a part, but all public accounts relative to the public lands.

In discharging this duty the act does not limit or qualify, in any way, the performance thereof, such as that the Commissioner may or may not do so according to his discretion, or that he is to audit and settle a certain class of public accounts to the exclusion of others; but it clearly imposes an unqualified duty to state an account for all demands growing out of the administration of the public lands. Therefore, under this act the Commissioner has stated the account from time to time for the payment of 5 per cent. on the cash sales of the public lands in said State, which is only a part of the public account relative to lands. He neglects and refuses to state an account for 5 per cent. for the sale of lands in exchange for the Government's own paper obligations called military warrants. The latter is no less the duty under the law than the former, for it is necessarily included under the phrase *all* public accounts. Neither are referred to in the law by the designation of 5 per cent., but both are alike public accounts to be stated under the law, and a failure to execute the whole law according to its requirements should be remedied by this Court, under this proceeding, by reminding the Commissioner that all accounts growing out of land transactions are to be stated,

when expressly enjoined by law, as in this case, and not simply a part thereof.

The performance of such a duty is, perhaps, more pointedly and imperatively imposed by the acts of Congress passed March 2d, 1855, and 3d of March, 1857, entitled acts to settle accounts between the United States and the State of Alabama, Mississippi and other States. They read as follows: "That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Alabama for the purpose of ascertaining what sum or sums of money are due to said State heretofore unsettled, under the act of March 2d, 1819, for the admission of Alabama into the Union, and that he be required to include in said account the several reservations under the various treaties with the Chickasaw, Choctaw and Creek Indians, within the limits of Alabama, and allow and pay to said State 5 per cent. thereon as in case of other sales."

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Commissioner of the General Land Office be, and he is hereby required to state an account between the U. S. and the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State heretofore unsettled, on account of the public lands in said State, and upon the same principles and allowances as prescribed in the act to settle certain accounts between the U. S. and the State of Alabama, approved 2d March, 1855; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to the said State 5 per centum thereon as in the case of other sales, estimating the land at the value of $1.25 per acre.

"Sec. 2. *And be it further enacted*, That the said Commissioner shall also state an account between the U. S. and each of the other States upon the same principles; and shall

allow and pay to each State such sum as shall thus be found due, estimating all lands and parmanent reservations at $1.25 per acre."

These acts are substantially the same in their import and requirements, and they apply alike to all States that are entitled to the payment of 5 per cent. on the sale of public land within their borders, or that contain permanent Indian reservations.

As will be seen from inspection, they require the Commissioner of the General Land Office to do two things, namely, to pay 5 per cent. upon Indian reservations, which has no connection with the subject under discussion, and secondly, to state an account between the U. S. and the State of Alabama, for the purpose of ascertaining what sum of money is due said State heretofore unsettled, under the act of March 2d, 1819, for the admission of said State into the Union. This shows two things very clearly: first, that there was an account unsettled between the two Governments at the date of the act, and, second, that that amount relates to the 5 per cent. which the U. S. had stipulated to pay on the sales of the public lands, for aside from this there is no other provision in said act out of which an account could arise in favor of the State against the general Government. The question, then, arises, What account heretofore unsettled did the act of March 2d, 1819, for the admission of the State of Alabama into the Union refer to? But one answer can be given to this question, and that is its undoubted reference to the payment of 5 per cent. on military locations of land, which was the only account under said law that had not been settled at the date of that act; and this is as certain and unmistakable as if the law had declared it in so many words instead of using the particular phraseology which it did; and that, too, more especially for the reason that there was no other unsettled account under said law to be audited and paid, except the 5 per cent. on lands purchased with military warrants; and this is relieved of all doubt, inasmuch as the books of the Land Office show

that the 5 per cent. on the cash sales of lands in Alabama had been settled and paid up to the 23d of October, 1854, being within 3 or 4 months of the date of said act. There was, therefore, no unsettled account on the cash sales of the public lands in Alabama, and, as a matter of fact, no laches, so far as it is known, has ever been imputed to the Government in the payment of the 5 per cent. on the cash sales of the public lands; this duty has been periodically performed without complaint as the account has accrued. Now the question again recurs: Did not Congress, by the language employed in this act, intend to include accounts heretofore unsettled on lands which military warrants had been located? If not, what lands does the act refer to? It is believed no other lands can be conceived of or pointed out. And if our construction of the act is not the true one, then it follows that the act is without meaning, and objectless. But we are not at liberty to put such a construction upon the law if we can find an object upon which it can take effect and operate. We claim, therefore, that this law is directory and imperative upon the Commissioner; that his duty thereunder is purely ministerial; that he has no dispensing power whereby he can evade, at his discretion, the duty which it fixes and imposes upon him.

The foregoing remarks apply with equal force to the second act, passed March 3d, 1857, for the benefit of the State of Mississippi and other States, which also provides that the Commissioner shall state an account between the Government and the other States for the purpose of ascertaining what sum of money is due to said States heretofore unsettled, on account of the public lands, in the same manner and upon the same principles and allowance as prescribed in the act to settle certain accounts between the United States and the State of Alabama.

It will be recollected that the account required to be stated by the Alabama act specifically related to unsettled balances due on the 5 per cent. clause in her act of admission, and necessarily could not refer to any other account

than that arising upon the entry and purchase of lands with military land warrants, inasmuch, as before stated, the 5 per cent. on cash sales had all been paid up to near the date of the act. Now this Alabama act is made applicable to the State of Iowa on the same principles and allowance, and can refer to no other unsettled account than that which grows out of the 5 per cent. clause of her act of admission. But, at the date of this second act, in Iowa as in Alabama, the 5 per cent. on cash sales had been regularly paid, and no complaint on that score had been made. There was, however, at that time, a large sum of money due and unsettled on account of lands in Iowa, which had been taken up and disposed of for military land warwants, and the very first Legislature of that State after the passage of said act, in the winter and spring of 1858, the Governor thereof was authorized by a joint resolution of the same to proceed to Washington and demand an adjustment of the account and the payment of the same; this was done and the demand refused.

During the war the application was suspended. Since the readjustment of the country after the war it has been renewed, but with no avail. The records and files of the Land Office show precisely the quantity of land in Iowa entered with land warrants, and the amount due the State thereon at 5 per cent. on an estimate of $1.25 per acre. Now, with reference to this very account, Congress says to the Commissioner, You are required to state the same, that it may be known how much is due to the State under the 5 per cent. stipulation of the act admitting the State into the Union; and he says he won't do it. He was not at liberty to refuse on the ground that the claim itself, should it be found to exist, was illegal, and the State not entitled to receive the same, for that was a question he could not consider: it had been withdrawn from him by the act itself.

If Congress had adjudged it illegal the Commissioner would not have been required to state it. Again, the Commissioner was not at liberty to refuse on the ground that it

was a political question, for it was not. Nor on the ground that it would be unwise and inexpedient, for these were questions already disposed of by Congress in imposing the duty—a duty purely ministerial, clearly mandatory, stripped of all conditions and limitations that would give the slightest pretense for the exercise of judgment or discretion; and yet the Commissioner says he will not perform this duty, setting himself directly in opposition of the law, which thus far has been a dead letter, and will remain so until this Court by its mandate shall order otherwise. The State of Iowa now respectfully asks that such an order may now be made, as her rights in the premises are entirely dependent thereon.

R. P. Lowe,
*Attorney for Petitioner.*

---

Note.—The foregoing brief on the power and jurisdiction of the Court to award the writ in this case was hurriedly prepared, leaving the question of the merits of the claim itself to be argued hereafter, if the rule to show cause is granted. If such rule is granted, I wish the Court would make it returnable the second Thursday of next term, to suit the convenience of counsel at a distance.

R. P. Lowe.